90-1191

No.

Supreme Court, U.S.
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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1990

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

VS.

WEISS BROS. CONSTRUCTION CO. dba WEISSCAL, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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QUESTIONS PRESENTED

1. Whether a breach of contract action against a public works contractor seeking damages for the contractor's violation of a written agreement to hire and train apprentices is preempted by § 514(a) of the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1144(a).

2. Whether a state law requiring state public works contractors employing workers in an apprenticeable craft to make payments to an apprenticeship trust fund or, in the alternative, to a state agency, "relates to" an employee benefit plan within the meaning of § 514(a) of ERISA, 29 U.S.C. § 1144(a), and is thus preempted by ERISA.

3. Whether California Labor Code Section 1777.5, which regulates apprenticeship manning and training requirements on public works, when used as the basis of a civil enforcement action, is saved from preemption by ERISA because such preemption would "alter, amend, modify, invalidate, impair or supersede" the provisions of the National Apprenticeship Act, 29 U.S.C. § 50, or regulations promulgated thereunder, within the meaning of § 514(d) of ERISA, 29 U.S.C. § 1144(d).

PARTIES TO THE PROCEEDING BELOW

Plaintiff/Appellants:

1. Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund

2. The Operating Engineers Joint Apprenticeship Committee for Northern California, on behalf of itself and on behalf of injured apprentices

Defendants/Respondents:

1. Weiss Bros. Construction Co., dba Weisscal
2. David Weiss
3. Allen Weiss
4. Fidelity and Deposit Corporation

(Although the Surety Company of the Pacific was named in the First Amended Complaint and filed an answer, it was not a party to the appellate proceeding below.)

TABLE OF CONTENTS

	Page
Questions Presented	i
Parties To The Proceeding Below	ii
Table Of Contents	iii
Table Of Appendices	iv
Table Of Authorities	v
Petition For Writ Of Certiorari	1
Opinions Below	1
Jurisdiction	2
Statutes And Regulations Involved	2
Statement Of The Case	2
A. Introduction	2
B. The Parties	4
C. California Labor Code § 1777.5	5
D. Origin and History of the Action at Issue	6
E. Analysis of the Decision Below	8
Reasons The Writ Should Be Granted	10
A. The Decision of the Court of Appeal Conflicts with Decisions of this Court and Lower Federal Appellate Courts	10
B. The Court of Appeals Erred in Failing to Consider Whether Application of the ERISA Preemption Clause to Petitioners' Claims is Consistent with the Congressional Purpose Underlying the Clause and ERISA Itself	14
C. The Decision of the Court of Appeal Ignores the Interdependent State and Federal Scheme for Regulating Apprenticeship	17
Conclusion	21

TABLE OF APPENDICES

Orders, Opinions, and Judgments Below and in Related Proceedings

Appendix

A. Order of the Supreme Court of California Denying Review

B. Decision of the California Court of Appeal

C. Order for Entry of Judgment of Dismissal

D. Order denying motion for reconsideration

E. Orders Sustaining Demurrers

F. Decision of the California Apprenticeship Council Appeal Board

Statutes and Regulations

G. Employee Retirement Income Security Act, §§ 514(a) and 514(d), 29 U.S.C. §§ 1144(a) and 1144(d)

H. National Apprenticeship Act (Fitzgerald Act), § 1, 29 U.S.C. § 50

I. National Apprenticeship Act Regulations, 29 C.F.R. § 29

J. California Labor Code, § 1777.5

TABLE OF AUTHORITIES

Cases

Page

Aetna Life Insurance Co. v. Borges, 869 F.2d 142 (2d Cir.), cert. denied, 110 U.S. 57 (1989) 13

Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981) 11

Boise Cascade Corp. v. Peterson, 735 F.Supp. 1434 (D. Minn. 1990) 3, 11, 13, 16

Firestone Tire & Rubber Co. v. Neusser, 810 F.2d 550 (6th Cir. 1987) 12

FMC Corporation v. Holliday, ____ U.S. ____, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990) 12

Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987) 10, 11, 12, 14, 15, 16

Hydrostorage, Inc. v. Northern Calif. Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), cert. denied, ____ U.S. ____, 111 S.Ct. 72, 112 L.Ed.2d 46 (1990) 3, 8

Ingersoll-Rand v. McClendon, ____ U.S. ____, 111 S.Ct. 478, 112 L.Ed.2d 474 (1990) .....

Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984) 12

Mackey v. Lanier Collection Agency & Service, Inc., 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988)..... 11

Massachusetts Mutual Life Ins. Co. v. Russell, 473 U.S. 134, 105 S.Ct. 3085, 87 L.Ed.2d 96 (1985) 13

Massachusetts v. Morash, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989) 10, 12, 13, 14

McHugh v. Howard, 165 Cal. App. 2d 169, 331 P.2d 674 (1958) 6

Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) 10, 11, 14, 20

Nachman Corp. v. Pension Benefit Guaranty Corp., 446 U.S. 359, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980)..... 14

TABLE OF AUTHORITIES

CASES

Page

Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund v. Weiss Bros. Construction Co., 221 Cal.App.3d 867, 270 Cal.Rptr. 786 (1990) ..... 2, passim

Pilot Life v. Dedeaux, 481 U.S. 41, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987) 11, 14

Rebaldo v. Cuomo, 749 F.2d 133 (2d Cir. 1985), cert. denied, 472 U.S. 1008 (1985) 12

Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983) 10, 11, 15

Suislaw Concrete Construction Co. v. State of Wash. Dept. of Transport, 784 F.2d 952 (9th Cir. 1986) 19

Statutes

23 U.S.C. § 140 19

28 U.S.C. § 1257(a) 2

California Labor Code § 1777.5 ..... 5, 19, passim

Employee Retirement Income Security Act:
§ 514(a), 29 U.S.C. § 1144(a) 2
§ 514(d), 29 U.S.C. § 1144(d) 2, 9, 17, 19, 20

National Apprenticeship Act (Fitzgerald Act):
§ 1, 29 U.S.C. § 50 ..... 2, 4, 9, 10, 17, 18

Shelley-Maloney Apprentices Labor Standards Act:
§ 3070 *et seq.* 4, 5, 17
§ 3075.1 17
§ 3076 ..... 4, 18
§ 3077 18
§ 3078 18
Parallel statutes from other states 10

TABLE OF AUTHORITIES

Regulations

Page

Employee Retirement Income Security Act:
29 C.F.R. § 2560.503-1(i) 13

Federal Aid to Highways Act:
23 C.F.R. § 230.111, *referring to* Appendix B of Subpart A (1988) 19

National Apprenticeship Act (Fitzgerald Act):
29 C.F.R. § 29 ..... 17, 18
29 C.F.R. § 29.2(i) 4
29 C.F.R. § 29.2(n)(1) 4, 18
29 C.F.R. § 29.5 18
29 C.F.R. § 29.6(i) 18
29 C.F.R. § 29.12 18

Legislative History

California Assembly Committee on Industrial Relations, Report of June 24, 1968, on Assembly Bill 805, 1968 Regular Session 19

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PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

Petitioners, Operating Engineers & Participating Employers Pre-apprentice, Apprentice and Journeyman Affirmative Action Training Fund, and the Operating Engineers Joint Apprenticeship Committee for Northern California, respectfully pray that a writ of certiorari issue to review the decision of the Court of Appeal of the State of California entered on June 26, 1990, in the above-entitled proceeding.

OPINIONS BELOW

The Order of the Supreme Court of the State of California denying, by a 4 to 3 vote, review of the decision of the California Court of Appeal (Appendix A, *infra.*) is unreported. The decision

of the Court of Appeal of the State of California, Third Appellate District, for which review is sought here, is reported as *Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund v. Weiss Bros. Construction Co.*, 221 Cal.App.3d 867, 270 Cal.Rptr. 786 (1990) (hereinafter *Weiss Bros.*), and is printed in Appendix B. The order for entry of judgment dismissing the complaint (Appendix C) is not officially reported. The order denying plaintiffs' motion for reconsideration (Appendix D) is not officially reported. The first decision on the merits in this matter occurred on defendants' demurrers to the First Amended Complaint; the orders sustaining defendants' demurrers, without leave to amend, (Appendix E) are not officially reported.

JURISDICTION

The decision of the Court of Appeal of the State of California was filed and entered on June 26, 1990. That decision was the final judgment rendered by the highest court of the State of California in which a decision could be had. The Order of the Supreme Court of the State of California denying review of that decision was filed and entered on October 25, 1990. This Court has jurisdiction to review the decision of the Court of Appeal pursuant to § 1257(a) of Title 28 of the United States Code.

STATUTES AND REGULATIONS INVOLVED

This case involves: Sections 514(a) and 514(d) of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §§ 1144(a) and 1144(d); Section 1 of the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. § 50; and Section 1777.5 of the California Labor Code. The text of each, including related federal regulations, is printed at Appendices G through J.

STATEMENT OF THE CASE

A. Introduction

This is the second time within a year that this Court has been requested to resolve the question of whether state public works

contractors can be compelled to observe apprenticeship manning and training obligations to which they voluntarily consented, despite the reach of the preemption clause embodied in § 514(a) of the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § 1144(a). *See Hydrostorage, Inc. v. Northern Calif. Boilermakers Local Joint Apprenticeship Committee,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, 111 S.Ct. 72, 112 L.Ed.2d 46 (1990). Because of the widespread use of apprenticeship programs to train skilled construction craft workers under the provisions of state law, this question is likely to arise repeatedly, until it is finally resolved by this Court.[1]

This case arises from the undisputed, willful refusal of a public works contractor to honor its written contract to train apprentices and to observe the provisions of California law governing the hiring and training of apprentices. The California Court of Appeal held that petitioners lack any remedy to redress these violations because all such remedies are preempted by § 514(a) of ERISA, 29 U.S.C. § 1144(a).

In April, 1985, the City of San Jose awarded Weisscal a contract exceeding $29,000,000 in value for construction of the San Jose Transit Mall Light Rail Project. Despite executing an agreement obligating it to provide more than 400 work-days of employment for operating engineer apprentices, Weisscal employed only a single apprentice on the project, for a period of eighteen days. Petitioners brought this action to compel Weisscal to comply with its contract. Dismissal of this action means that thousands of man-hours of vital apprentice training have been lost, to the detriment of apprentices eager to gain experience in heavy construction, and to the long-term detriment of the public at large.

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[1] One federal district court has already reached a contrary result; *see Boise Cascade Corp. v. Peterson,* 735 F.Supp. 1434 (D. Minn. 1990).

B. The Parties

1. *The Fund*

Petitioner Operating Engineers & Participating Employers Preapprentice, Apprentice and Journeyman Affirmative Action Training Fund ("Fund") is a multiemployer, joint labor-management trust fund. It was established in 1968 through collective bargaining pursuant to Section 302(c)(6) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(6). Since 1975 the Fund has been governed by the Employee Retirement Income Security Act of 1974 ("ERISA"), 29 U.S.C. § 1001 *et seq.*, as an employee welfare benefit plan. The express purpose of the Fund is to provide for recruitment and training of apprentices and journeymen in the operating engineer craft in Northern California.[2]

2. *The JAC*

Petitioner Operating Engineers Joint Apprenticeship Committee for Northern California ("JAC") is a joint labor-management apprenticeship committee. It was organized, and is registered, in the State of California under the Shelley-Maloney Apprentice Labor Standards Act of 1939, as amended, California Labor Code § 3070 *et seq.*, and under the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. § 50. Pursuant to California Labor Code § 3076 and to regulations promulgated by the Department of Labor under the National Apprenticeship Act and codified at 29 C.F.R. § 29.2(n)(1), the JAC formulates and administers apprenticeship standards for operating engineers in Northern California. Pursuant to California Labor Code § 3076 and 29 C.F.R. § 29.2(i), the JAC also sponsors and administers an apprenticeship program for operating engineers in Northern California. The JAC is the only organization authorized by the State of California and by the Department of Labor to establish apprenticeship standards and to administer an apprenticeship program in the operating engineers craft in Northern California.

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[2] The term "operating engineer" refers to operators of heavy mechanized construction equipment, such as tractors, cranes, bulldozers, backhoes, loaders and scrapers. Years of training are required to become proficient in the operation of this complex equipment.

The JAC is also authorized to enter into apprenticeship agreements with individual apprentices and employers and to bring action to enforce those agreements and to recover lost wages and fringe benefits for apprentices.

3. *Respondents Weisscal, David Weiss and Allen Weiss*

Respondent Weiss Bros. Construction Co. is a heavy construction contractor licensed to do business in California as Weisscal. Respondents David and Allen Weiss are owners, officers, and directors of Weisscal. Neither Weisscal, David Weiss, nor Allen Weiss are or have been signatory to any collective bargaining agreement or trust agreement binding any of them to the Fund or the JAC. Respondent Fidelity and Deposit Corporation is the issuer of a payment bond to Weisscal.[3]

C. California Labor Code § 1777.5

California Labor Code § 1777.5 (hereafter "§ 1777.5")governs the apprentice manning and training obligations of state and local public works contractors. Section 1777.5 of the Labor Code, as in effect at the time this action arose (Appendix "J"), provides that any employer who accepts a public works contract employing journeymen in an apprenticeable craft shall (1) apply to the joint apprenticeship committee administering the apprenticeship standards in the craft for a certificate approving the contractor for employment and training of apprentices under the JAC's apprenticeship standards; (2) employ apprentices in the craft at the ratio of no less than one apprentice for each five journeymen; and (3) contribute to the apprenticeship fund in the craft in the same amount as other contractors in the area. In addition, § 1777.5 provides that only registered apprentices who are in training under apprenticeship standards and written apprenticeship agreements approved by the State under the Shelley-Maloney Apprentice Labor Standards Act, Cal. Labor Code § 3070 *et seq.*, may be employed on public works. The statute also requires that stipulations to effectuate § 1777.5 be inserted in every public works contract.

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[3] For convenience, respondents are sometimes referred to herein collectively as "Weisscal."

D. Origin and History of the Action at Issue

In April, 1985, the City of San Jose awarded Weisscal a public works contract in excess of $29,000,000 for construction of the San Jose Transit Mall Light Rail Project.[4] This contract called for the employment of a substantial number of operating engineers and incorporated the provisions of § 1777.5. Weisscal thus obligated itself *by contract* to hire operating engineer apprentices. Weisscal applied to the JAC for a certificate to employ and train apprentices and executed with the JAC an "Agreement to Train Apprentices" (a "DAS-7" agreement), pursuant to which Weisscal agreed to hire and train apprentices from the JAC's apprenticeship program "in accordance with the apprenticeship standards and apprentice agreement." In accepting the public works contract, Weisscal also became bound to contribute to the Fund. Such payments were to be based on the work hours of operating engineers, whether journeyman or apprentice, employed on the project.

From July, 1985, through October, 1987, Weisscal employed five or more operating engineers on the project on 408 days (including night shifts as additional "days") and 10 or more operating engineers on 55 days. Accordingly, during that period alone, Weisscal became obligated to provide operating engineer apprentices 463 "days" of employment. During that period petitioners and state officers corresponded and met frequently with Weisscal in an effort to obtain Weisscal's compliance with § 1777.5. Despite repeated promises to comply, Weisscal only employed one operating engineer apprentice for 18 days.[5]

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[4] The factual recitation herein is drawn from the allegations of petitioners' First Amended Complaint and the opinion of the Court of Appeal. Where, as here, a complaint is tested for legal sufficiency by a demurrer, the allegations are assumed to be true; *see, e.g., McHugh v. Howard*, 165 Cal.App.2d 169 (1958). Relevant facts are also drawn from the Decision of the California Apprenticeship Council Appeal Board (Appendix F, *infra*) in a related administrative proceeding, described below, which is *res judicata* between the parties.

[5] Weisscal continued work on the project for several months beyond October, 1987, obligating itself to provide additional undetermined days

Petitioners initiated two courses of action. First, they filed a complaint in the Division of Apprenticeship Standards("DAS") of the State of California seeking enforcement of § 1777.5 of the Labor Code. As a result of this administrative proceeding, the State Administrator of Apprenticeship determined that Weisscal had willfully failed to comply with the provisions of § 1777.5 and therefore recommended that Weisscal be barred from bidding on any state or local public works contracts for a year and that a civil fine be imposed. On appeal, the California Apprenticeship Council of the State of California upheld the determination and imposed the debarment and fine. This determination, which is *res judicata* as to the facts underlying the present action, is printed in Appendix F, *infra*.

However, this State administrative proceeding did not provide any relief to petitioners for the injuries they and the apprentices had suffered as a result of Weisscal's willful violations. Therefore, in February, 1988, petitioners filed the present action in California Superior Court.

Petitioners' First Amended Complaint sought to recover either liquidated damages (for failure to provide training hours) or lost wages and benefits (for apprentices whom Weisscal had been obligated to employ) and to collect unpaid training fund contributions. Liquidated damages would be determined in accordance with provisions for such relief in the Apprenticeship Standards; alternatively, lost wages and benefits would be determined in accordance with either the Apprenticeship Standards or California's prevailing wage law.[6]

Weisscal demurred to the First Amended Complaint. The trial court entered orders sustaining Weisscal's demurrers, without

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of apprentice employment. Weisscal eventually began paying the required training fund-contributions. However, an undertermined amount of such contributions remains due.

[6] The opinion of the California Court of Appeal appears to misstate the nature of petitioners' complaint as being one primarily for employer trust fund contributions. *Weiss Bros., supra,* 221 Cal.App.3d at 873. That aspect of the complaint has always been secondary to the action for failure to hire and train apprentices.

leave to amend, on the ground that all of petitioners' claims are preempted by Section 514(a) of ERISA, 29 U.S.C. § 1144(a). Petitioners responded with a motion for reconsideration or for relief from the orders, seeking leave to amend the complaint. Petitioners' motion was denied by an order entered in October, 1988. Two weeks later the trial court entered an order dismissing petitioners' complaint without leave to amend.

Petitioners filed a timely notice of appeal to the Court of Appeal of the State of California. In its decision, filed June 26, 1990, the Court of Appeal affirmed the decision of the trial court, holding that petitioners' breach of contract suit was preempted by ERISA. Petitioners then petitioned the California Supreme Court for review of that decision. Although three of the seven justices of that Court voted to hear the appeal, the petition was denied.

E. Analysis of the Decision Below

The California Court of Appeal held that petitioners' action to enforce a DAS 7 agreement "relates to" an employee benefit plan within the meaning of § 514(a) of ERISA and thus is preempted. *Weiss Bros.*, 221 Cal.App.3d at 877. The Court of Appeal reached this conclusion by treating petitioners' complaint as being solely for breach of the DAS-7 agreement and as based only on the JAC's apprenticeship standards.[7] *Id.* at 875-876.

In reaching its decision, the Court of Appeal closely followed the reasoning of the Ninth Circuit in *Hydrostorage v. Northern California Boilermakers*, 891 F.2d 719 (9th Cir. 1989) ("*Hydrostorage*"), *cert. den. sub nom. California Div. of Apprenticeship Standards v. Hydrostorage, Inc.*, ____ U.S. ____, 111 S.Ct. 72, 112 L.Ed.2d 46 (1990). The Court of Appeal reasoned

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[7] The Court of Appeal held that Weisscal's voluntary execution of a DAS-7 agreement to hire and train apprentices did not preclude Weisscal from asserting ERISA's preemption clause as a total bar to an action to enforce the provisions of that agreement. The astonishing result of the Court of Appeal's decision is that, while Weisscal has with impunity breached its contract, those who have been damaged thereby are left with no remedy whatsoever.

that the JAC's apprenticeship standards constitute the terms of an ERISA "plan," that § 1777.5 would compel a public works contractor to become bound by the terms of such a plan, and that, therefore, § 1777.5 impermissibly "relates to" an employee benefit plan. *Weiss Bros.*, 221 Cal.App.3d at 875-878.

The Court of Appeal also rejected petitioners' argument, relying on § 514(d) of ERISA, 29 U.S.C. § 1144(d),[8] that their causes of action are not preempted by ERISA because such preemption would impair federal-state cooperation in promoting and regulating the training of apprentices, established pursuant to the National Apprenticeship Act ("the Fitzgerald Act"), 29 U.S.C. § 50, *et seq*. *Weiss Bros.*, 221 Cal.App.3d at 878-79.

Again following the opinion in *Hydrostorage*, 891 F.2d at 730-732, the Court of Appeal ruled that the Fitzgerald Act does not embody a project in "cooperative federalism" which might be impaired by preemption of § 1777.5. The court reasoned that the Fitzgerald Act relates only to promulgation of apprenticeship standards and registration of apprenticeship programs for federal purposes and does not contemplate enforcement mechanisms. According to the Court of Appeal, since § 1777.5 serves only state purposes and is not an enforcement mechanism of federal law, preemption of any provision of § 1777.5 would not impair the Fitzgerald Act or its regulations. *Id.*, 221 Cal.App.3d at 878-79.[9]

In sustaining Weisscal's preemption defense, the Court of Appeal relied entirely upon dictionary definitions of the terms

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[8] Section 514(d) provides that the provisions of ERISA may not be construed to "alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law."

[9] By focusing almost exclusively on the Ninth Circuit's opinion in *Hydrostorage*, the California Court of Appeal appears not to have considered many critical matters, including: (1) the extent to which § 1777.5 parallels federal requirements which have similar enforcement provisions, and (2) the fact that both the federal regulations and the California Labor Code authorize JAC's to formulate apprenticeship standards in their craft and adopt those standards as enforceable under federal and state law.

"plan" and "relate to" in the preemption clause. *Id.*, 221 Cal. App.3d at 875, 877. The Court of Appeal did not examine whether preemption of petitioners' claims by ERISA would be consistent with the purpose of ERISA's preemption clause or with the underlying purposes of ERISA, as this Court did in *Fort Halifax Packing Co. v. Coyne ("Fort Halifax")*, 482 U.S. 1, 8-10, 107 S.Ct. 2211, 96 L.Ed.2d 1 (1987), and *Massachusetts v. Morash*, 490 U.S. 107, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989).

Nor did the Court of Appeal consider whether petitioners' claims against Weisscal are too remote and peripheral to the purposes of ERISA to bring the preemption clause into play, *see*, e.g., *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 100, n. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983); or that preemption of § 1777.5 would unnecessarily interfere with areas of traditional state regulation, *see*, e.g., *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985).

REASONS THE WRIT SHOULD BE GRANTED

A. The Decision of the Court of Appeal Conflicts with Decisions of this Court and Lower Federal Appellate Courts

California is one of twenty-eight states that regulate apprenticeship under the auspices of the National Apprenticeship Act.[10] If the Court does not grant certiorari in this case, the issues presented here will almost certainly be litigated repeatedly. Al-

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[10] *See*, e.g.: Del. Code Ann. tit. 19, § 201 to 204 (1953); Md. Code Ann. § 3-401 to 3-407 (1983); Mass. Ann. Laws ch. 23 § 11E to 11K (1990); Minn. Stat. § 178.01 to 178.10 (1990); N.J. Stat. Ann. § 34:1A-36 to 34:1A-41 (1989); New York Lab. Law § 810- 818 (Consol. 1990); Or. Rev. Stat. § 660.002 to 660.190 (1989); Tex. Educ. Code § 33.01 to 33.11 (1989); Wash. Rev. Code § 49.04.010 to 49.04.910 (1990); V.I. Code Ann. tit. 24 § 221-234(1989). Most such states also provide that only registered apprentices may be employed on public works. *See*, e.g., Del. Code Ann. tit. 19, § 231-7 (1953); Md. Code Ann. § 17-205(b) (1983); New York Lab. Law § 220-3-e (Consol. 1990); Wash. Rev. Code § 39.12.021 (1990). California, at § 1777.5, differs from these only in *requiring* employment of apprentices on public works. *But see also*, V.I. Code Ann. tit. 24, § 111 (1990).

ready, contrary to the present case and to *Hydrostorage*, one United States District Court has upheld a state law regulating the ratio of journeymen to apprentices against a challenge based on ERISA preemption; *see Boise Cascade Corp. v. Peterson*, 735 F.Supp. 1434 (D. Minn. 1990).

Petitioners recognize the "deliberately expansive" nature of ERISA's preemption clause. *Pilot Life v. Dedeaux*, 481 U.S. 41, 46, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987), *quoting Alessi v. Raybestos-Manhattan, Inc.*, 451 U.S. 504, 523, 101 S.Ct. 1895, 68 L.Ed.2d 402 (1981). However, this court also "has recognized limits to ERISA's preemption clause." *Ingersoll-Rand v. McClendon*, ___ U.S. ___, ___, 111 S.Ct. 478, 483, 112 L.Ed.2d 474 (1990). In *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 100, n. 21, 103 S.Ct. 2890, 77 L.Ed.2d 490 (1983), this Court stated that "[s]ome state actions may affect employee benefit plans in too tenuous, remote, or peripheral a manner to warrant a finding that the law 'relates to' the plan." In *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985), this Court also advised that, absent express grounds for inferring to the contrary, the courts "must presume that Congress did not intend to pre-empt areas of traditional state regulation."

Most importantly, in *Fort Halifax*, 482 U.S. at 7-19, this Court held that a state law mandating payment of severance pay upon plant closing is not preempted by ERISA where that law relates, not to "employee benefit plans," but only to "employee benefits," and where, therefore, preemption by ERISA does not serve the "plain language of ERISA's pre-emption provision, the underlying purpose of that provision, [or] the overall objectives of ERISA."[11]

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[11] *See also Mackey v. Lanier Collection Agency & Service, Inc.*, 486 U.S. 825, 108 S.Ct. 2182, 100 L.Ed.2d 836 (1988), where the Court examined a state law in light of the language and structure of ERISA and the purpose of ERISA's preemption provision and held that a state garnishment law of general application, not intruding upon matters that ERISA regulates or precludes the states from regulating, is not pre-empted by ERISA.

Similarly, in *Massachusetts v. Morash, supra,* this Court held that a state law mandating payment of accrued vacation pay also was not preempted where that law relates only to employee benefits and does not trench upon the purposes of ERISA's preemption provision or of ERISA itself. The Court reasoned that interpreting ERISA to govern "vacation benefits," as distinguished from vacation benefit plans,

> "would also displace the extensive state regulation of the vesting, funding and participation rights of vacation benefits; because ERISA's vesting and funding requirements do not apply to welfare benefit plans, . . . employees would actually receive less protection if ERISA were applied to ordinary vacation wages paid from the employer's general assets. . . . The States have traditionally regulated the payment of wages, including vacation pay. Absent any indication that Congress intended such far-reaching consequences, we are reluctant to so significantly interfere with 'the separate spheres of governmental authority preserved in our federalist system.'"

Massachusetts v. Morash, 490 U.S. at ____, 104 L.Ed.2d at 111 (citations omitted), *quoting Fort Halifax,* 482 U.S. at 19.[12]

Each of these limiting principles has also been followed by the lower federal appellate courts. See, *e.g., Lane v. Goren,* 743 F.2d 1337 (9th Cir. 1984) (state fair employment laws not preempted as applied to benefit plan employees because those laws are laws of general application having only a peripheral effect on ERISA plans); *Rebaldo v. Cuomo,* 749 F.2d 133 (2d Cir. 1985) (law preventing employee benefit plans from negotiating discount rates with hospitals not preempted because that law is an exercise of the state's traditional police power in a manner that only tangentially affects ERISA plans), *cert. denied,* 472 U.S. 1008 (1985); *Firestone Tire & Rubber Co. v. Neusser,* 810 F.2d 550 (6th Cir. 1987) (city tax causing reduction in employee benefit plan

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[12] None of these principles limiting the scope of ERISA's preemption provision have been altered by the Court's recent decisions in *FMC Corporation v. Holliday,* ____ U.S. ____, 111 S.Ct. 403, 112 L.Ed.2d 356 (1990), and in *Ingersoll-Rand v. McClendon, supra.*

contributions not preempted for the same reason); and *Aetna Life Insurance Co. v. Borges*, 869 F.2d 142 (2d Cir.) (state escheat law imposing economic and administrative burden on employee benefit plans not preempted), *cert. denied*, 110 U.S. 57 (1989). *See also Boise Cascade Corp. v. Peterson*, 735 F.Supp. 1434 (D.Minn. 1990) (state administrative regulations mandating journeyman-apprentice ratios not preempted by ERISA).

Petitioners' cause of action for failure to hire and train apprentices relates, if at all, only tangentially to any employee benefit plan and to the concerns expressed by Congress in enacting ERISA. This cause of action would not impose on Weisscal any of the burdens of administering an apprenticeship plan; it would only require Weisscal to maintain the same payroll records that it must maintain in any case.[13] All Weisscal would be required to do is to meet the same manning and training requirements which the State of California imposes on all public works contractors.

Moreover, this cause of action is only peripherally, if at all, related to ERISA because ERISA does not regulate apprentice manning and training, and nothing in ERISA or its legislative history suggests that ERISA was intended to preclude the states from continuing to regulate apprenticeship manning and training or that apprenticeship was more than "peripheral" to the congressional purposes that motivated the passage of ERISA.[14]

This action also only remotely relates to ERISA because it does not implicate ERISA's underlying purpose of preserving and stabilizing employee pension and welfare benefits and protecting fund assets from mismanagement. *See, generally, Massachusetts v. Morash*, 490 U.S. at ____, 104 L.Ed.2d at 107; *Massachusetts Mutual Life Ins. Co. v. Russell*, 473 U.S. 134, 142, 105 S.Ct.

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[13] The burdens of maintaining and administering the plan are borne by the JAC, the Fund, and those employers that are signatory to the collective bargaining or trust agreement.

[14] Except for its disclosure and fiduciary provisions, ERISA has little bearing on apprenticeship plans. Indeed, the Department of Labor's own regulations on procedures for handling and reviewing benefit claims do "not apply to employee benefit plans which provide solely apprenticeship training benefits." 29 C.F.R. § 2560.503-1(i).

3085, 87 L.Ed.2d 96 (1985); *see also Nachman Corp. v. Pension Benefit Guaranty Corp.*, 446 U.S. 359, 361, 100 S.Ct. 1723, 64 L.Ed.2d 354 (1980). These concerns are clearly not implicated by petitioners' action to enforce Weisscal's obligation to hire and train apprentices.

B. The Court of Appeals Erred in Failing to Consider Whether Application of the ERISA Preemption Clause to Petitioners' Claims is Consistent with the Congressional Purpose Underlying the Clause and ERISA Itself

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 8, 117 S.Ct. 2211, 96 L.Ed.2d 1 (1987), this court noted that the terms "employee benefit plan" and "plan" "are defined only tautologically in the statute," and, as a result, "attention to [congressional] purpose is particularly necessary" to determine whether ERISA's preemption clause should operate as a bar to a state claim.[15] In analyzing the reach of ERISA's preemption clause "as in any preemption analysis, 'the purpose of Congress is the ultimate touchstone.'" *Metropolitan Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747 (1985) quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978).

Yet, the opinion of the Court of Appeal contains no discussion of the congressional purpose lying behind ERISA or its preemption clause. Instead, copying the reasoning of *Hydrostorage*, the Court of Appeals merely determined that the JAC's apprenticeship standards constitute a "plan" and thus bring preemption into play.[16]

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[15] *See also, Massachusetts v. Morash*, 490 U.S. at ____, 104 L.Ed.2d at 108: "in expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy," *quoting Pilot Life Insurance Co. v. Dedeaux*, 481 U.S. 41, 51, 107 S.Ct. 1549, 95 L.Ed.2d 39 (1987).

[16] In concluding that § 514(a) of ERISA operates to bar petitioners' claims, both the Court of Appeal and the opinion in *Hydrostorage* rely upon dictionary definitions of the term "plan." This simplistic approach to statutory construction omits any consideration whatsoever of the congressional intent underlying the preemption clause.

In *Fort Halifax*, 482 U.S. at 10, the Court found that the preemption clause was designed to protect employers from the expense and frustration that would result from the imposition of inconsistent state requirements on employer-administered plans:

> "It is thus clear that ERISA's preemption provision was prompted by recognition that employers establishing and maintaining employee benefit plans are faced with the task of coordinating complex administrative activities. A patchwork scheme of regulation would introduce considerable inefficiencies in benefit program operation, which might lead those employers with existing plans to reduce benefits, and those without such plans to refrain from adopting them. Preemption ensures that the administrative practices of a benefit plan will be governed by only a single set of regulations."

The court described the purpose of ERISA's preemption provision in essentially the same terms in *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 107-108:

> "An employer with employees in several states would find its plan subject to a different jurisdictional pattern of regulation in each State, depending on what benefits the State mandated under disability, workmen's compensation, and unemployment compensation laws. The administrative impracticality of permitting mutually exclusive pockets of federal and state jurisdiction without a plan is apparent."

In the present case there is no danger that any employers will be exposed to the administrative nightmares inherent in administering benefit plans pursuant to conflicting state regulation. Weisscal, and other similarly situated employers, have no administrative responsibilities whatsoever with regard to the "plan" at issue in this case. The "plan" is administered by the JAC, and individual employers are only obligated to hire apprentices and make payments to the training fund. There is no risk that a public works contractor will abandon a benefit plan or reduce benefits as a result of this program, since the "plan" is not promulgated by the contractor. Nor is the contractor subject to confusing and conflicting "plan" requirements, since the apprentice manning

and training regulations govern only employment of apprentices and apply to such contractors only by virtue of their acceptance of a California public works contract.[17]

In *Boise Cascade Corp. v. Peterson*, 735 F.Supp. 1434 (D.Minn. 1990), a United States District Court rejected a challenge to Minnesota's mandatory journeyman-apprentice ratio requirement, finding that it did not implicate any of the core concerns of ERISA. In the present case, the Court of Appeal has omitted any consideration whatsoever of whether the present action implicates policy concerns underlying the passage of ERISA. In doing so, and in relying upon common dictionary definitions of the key provisions of the preemption clause, the Court of Appeal has opened the door to preemption of any number of state laws which only peripherally affect employee benefit plans and thus do not implicate the underlying concerns of ERISA in any meaningful way.

As this court stated in *Fort Halifax*, 482 U.S. at 11:

> "Congress intended preemption to afford employers the advantages of a uniform set of administrative procedures governed by a single set of regulations. This concern only arises, however, *with respect to benefits whose provision by nature requires an ongoing administrative program to meet the employer's obligation.*" (Emphasis supplied.)

In the present case, however, petitioners' causes of action would not impose on Weisscal any "ongoing" benefit obligation at all. Once its contractual obligations on the San Jose Light Rail project are completed, its obligations are at an end. By failing to consider the purposes of ERISA and its preemption provision, the Court of Appeal has reached a decision which, instead of serving

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[17] The mere fact that the apprenticeship regulations may require the employer to treat employees on California public works projects differently than its employees elsewhere does not implicate the concerns underlying ERISA's preemption clause. Virtually every state regulates employment on public works projects, while leaving employers considerably freer to set the terms and conditions of employment on private works.

the intent of Congress in enacting ERISA, actually endangers employee benefits.

C. The Decision of the Court of Appeal Ignores the Interdependent State and Federal Scheme for Regulating Apprenticeship

In failing to consider the purposes of ERISA and its preemption provision, specifically of § 514(d) of ERISA, 29 U.S.C. § 1144(d), and of the National Apprenticeship Act, 29 U.S.C. § 50, and regulations thereunder at 29 C.F.R. § 29, the Court of Appeal has reached a result that also would impair Congress' intent that federal and state governments, together with the private sector, cooperate in promoting and regulating apprenticeship.

Prior to enactment of ERISA, both the states and the federal government regulated apprenticeship. In 1937 Congress enacted the National Apprenticeship Act (Fitzgerald Act), 29 U.S.C. § 50. That Act directs the Secretary of Labor

> "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, *to bring together employers and labor for the formulation of programs of apprenticeship,* [and] *to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship* . . ." (Emphasis added.)

In 1939 the State of California enacted the Shelley-Maloney Apprentice Labor Standards Act, California Labor Code § 3070 *et seq.* In that Act California set up the basic administrative structure under which the JAC's apprenticeship program operates and under which § 1777.5 would later operate. In § 3075.1 of the Labor Code, added in 1976, the California legislature re-affirmed its purpose in enacting these laws by declaring:

> "It is the public policy of this state to encourage the utilization of apprenticeship as a form of on-the-job training, when such training is cost-effective in developing skills needed to perform public services. . . . In furtherance of this

> policy, public agencies shall take into consideration . . . the application of established programs in the private sector, where appropriate."

Mirroring the Fitzgerald Act, a central purpose of California's apprenticeship laws has been to cooperate with the private sector and with federal agencies in promoting and regulating apprenticeship.

In 1977, *following* enactment of ERISA, the Department of Labor published its regulations under the Fitzgerald Act, establishing apprenticeship standards and procedures for registering apprenticeship programs for various federal purposes. *See* 29 C.F.R. § 29. These regulations provide that joint apprenticeship committees may formulate apprenticeship standards in their crafts and that these standards shall be enforceable for federal purposes. 29 C.F.R. §§ 29.2(n)(1), 29.5, and 29.6(i). Parallel provisions are central to California's apprenticeship laws. See Cal. Labor Code §§ 3076, 3077, and 3078.

In accordance with the Fitzgerald Act's directive to "cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship," the federal regulations also provide that state apprenticeship agencies, laws, and regulations may be federally certified, so that approval of apprenticeship programs, standards, and agreements under state law may also serve as approval for federal purposes. 29 C.F.R. § 29.12. The State of California, having conformed its apprenticeship laws with these federal regulations, has obtained such certification and administers those federal regulations under its laws. Thus, in states such as California, parallel state laws regulate apprenticeship standards and programs, and uniform state and federal laws regulate in that area for both state and federal purposes.[18]

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[18] The *Weisscal* opinion does not explain why the court rejected the contention that California's apprenticeship laws represent a project in "cooperative federalism" under the auspices of the Fitzgerald Act. *See Weisscal, supra*, 221 Cal. App.3d at 880. Given the close interrelationship between the development of state and federal apprenticeship regulation, it is difficult to see why the Court of Appeals gave this point such short shrift.

In 1968 California enacted § 1777.5, requiring employment on state public works of one apprentice for every five journeymen. As stated in the June 24, 1968, report on Assembly Bill 805 by the California Assembly Committee on Industrial Relations, 1968 Regular Session, the purposes of this requirement were "to expand the number of apprenticeship training slots in California in order to enable more young persons to become skilled building craftsmen" and to provide opportunities to the "disadvantaged." In that same year California also enacted the requirement that state public works contractors contribute to the appropriate training fund. Both of these requirements have had a significant impact in the construction industry in California in encouraging the creation and operation of apprenticeship programs.

Like California Labor Code § 1777.5, various federal regulations also have required employment of registered apprentices on federal public works projects. *See,* e.g., 23 U.S.C. § 140; and 23 C.F.R. § 230.111, referring to Appendix B of Subpart A (1988), regarding employment of apprentices on federal highway projects. Like § 1777.5, these federal requirements are also enforced by barring violators from bidding on other federal projects and by actions for unpaid wages. *Suislaw Concrete Construction Co. v. State of Wash. Dept. of Transport,* 784 F.2d 952 (9th Cir. 1986) (state apprenticeship regulations, including prevailing wage requirements, administered for Fitzgerald Act purposes are not preempted by other federal law).

This federal-state cooperation in promoting and regulating apprenticeship effectively serves both federal and state interests. Until recently no one had argued that such state laws might interfere with ERISA's regulation of apprenticeship plans. That contention has now been raised not by Congress, nor by the Department of Labor but only by those employers who want to avoid burdens they voluntarily assumed in accepting a public works contract.

Even if § 1777.5 *does* relate to employee benefit plans, § 514(d) of ERISA provides that ERISA may not be construed to "alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." Close examination of the matters at issue in this case

shows that preemption of petitioners' causes of action would seriously impair the federal-state cooperative scheme contemplated by the Fitzgerald Act.

Relying upon *Hydrostorage, supra,* the Court of Appeals found that preemption of petitioners' claims against Weisscal would not impair federal law because § 1777.5 "is not an enforcement mechanism of federal law." This reasoning displays a simplistic and unnecessarily narrow view both of the scope of § 514(d) and of Congress' intent in enacting the Fitzgerald Act. Where, as here, federal law explicitly leaves the determination of technical details of an apprenticeship program and provisions for enforcement to state law, preemption of state remedies to enforce such rules effectively impairs the federal purpose to exactly the same extent as if the rules being enforced and the enforcement provisions were explicitly embodied in federal statutes.

Moreover, nothing in the language of § 514(d) or in the legislative history of ERISA suggests that Congress intended a view as narrow as that expressed by the Court of Appeal of the kind of impairment of federal law § 514(d) prohibits. In the Fitzgerald Act Congress clearly intended the federal government to cooperate with the States in regulating apprenticeship, and nothing in ERISA shows an intent of Congress to modify this federal-state cooperation or to preempt state remedies designed to enforce state apprentice manning and training requirements. Yet that is exactly the effect which application of ERISA's preemption clause has in this case. If petitioners' causes of action are preempted by ERISA merely because they make reference to JAC apprenticeship standards, then state law may not be used to enforce such standards here or elsewhere; and the scheme of federal and state regulation of apprenticeship set forth in the Fitzgerald Act and its regulations is seriously impaired.

This Court has held that courts "must presume that Congress did not intend to preempt areas of traditional state regulation." *Metropolitan Life Ins. Co. v. Massachusetts,* 471 U.S. 724, 740, 105 S.Ct. 2380, 2389 (1985). It is clear that preemption of petitioners' causes of action would impair the power of the states to regulate in an area the states have traditionally regulated and

that such preemption would not serve the purposes of either ERISA or its preemption provision.

Nowhere in ERISA or in its legislative history does Congress refer to state laws regulating apprenticeship manning and training. Nevertheless, without serving any purpose of ERISA, by adopting narrow, wooden interpretation of what ERISA may not impair, the decision of the Court of Appeal will severely impair that federal-state cooperation contemplated by the Fitzgerald Act. Indeed, the decision of the Court of Appeal will result in creating the anomaly that the same state laws that may be enforced for federal purposes may not be enforced for state purposes. Congress cannot have intended such a result.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be granted.

DATED: January 23, 1991

STANTON, KAY & WATSON
JAMES P. WATSON*
LAWRENCE H. KAY
BRUCE K. LEIGH

LAW OFFICES OF JOE R. MCCRAY
JOE R. MCCRAY

**Counsel of Record*

Appendix A

Order Denying Review

After Judgment by the Court of Appeal

Third Appellate District No. C005645
S016907

In the Supreme Court of the State of California

In Bank

[FILED OCT 25 1990]

Operating Engineers and Participating Employees, Etc. Et Al.,
Appellants

v.

Weiss Brothers Construction, Etc. Et Al.,
Respondents

Petition for review DENIED.

Mosk, J., Broussard, J. and Kennard, J. are of the opinion the petition should be granted.

LUCAS
Chief Justice

Appendix B

Court of Appeal of the State of California
Third Appellate District

(Sacramento)

3 Civil C005645
(Super.Ct.No. 500698)

Operating Engineers & Participating Employees
Pre-Apprentice, Apprentice and Journeyman
Affirmative Action Training Fund, et al.,
Plaintiffs and Appellants,

v.

Weiss Bros. Construction Co. dba Weisscal, et al.,
Defendants and Respondents.

[Filed June 26, 1990]

APPEAL from a judgment of Superior Court of Sacramento County, Anthony DeCristoforo, Jr., Judge. Affirmed.

Lawrence H. Kay, Bruce K. Leigh, Stanton, Kay & Watson, and Joe R. McCray, Law Offices of Joe McCray for Plaintiffs and Appellants.

Kent Jonas, Law Office of Graham & Jonas, David E. Bordon, Marilyn Klinger, Sedgwick, Detert, Moran & Arnold, and Mark E. Otto, Law Offices of Bolling, Walter & Gawther for Defendants and Respondents.

Plaintiffs Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund (the Trust Fund) and The Operating Engineers Joint Apprenticeship Committee for Northern California (the JAC) appeal from the trial court's judgment in favor of defendants Weiss Bros. Construction Co. dba Weisscal, David Weiss, Alan Weiss, and Fidelity and Surety Company of Maryland.[1] After ruling that the Employee Retirement Income Security Act

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[1] For convenience, unless otherwise indicated, we refer to appellants collectively as "the JAC" and respondents collectively as "Weisscal."

(ERISA) preempted the JAC's breach of contract action against Weisscal, the trial court sustained the demurrer to and dismissed the first amended complaint. We shall follow the recent Ninth Circuit decision in Hydrostorage v. Northern Cal. Boilermakers (9th Cir. 1989) 891 F.2d 719, and affirm.

BACKGROUND

In ruling on a judgment of dismissal following the sustaining of a demurrer without leave to amend, we take as true the complaint's well pleaded facts. (See, e.g., Leach v. Drummond Medical Group, Inc. (1983) 144 Cal.App.3d 362, 366, quoting Porten v. University of San Francisco (1976) 64 Cal.App.3d 825, 827-828.) According to the first amended complaint, the Trust Fund is an employee benefit plan under ERISA. (See 29 U.S.C. §§ 1002 & 1003.) It was created by a collective bargaining agreement. The JAC is "an apprenticeship program committee registered with the State of California, Department of Industrial Relations, Division of Apprenticeship Standards." Its responsibilities include "protection of apprentices registered by the State of California in the [JAC's] training program, including the authority to enforce the right of such apprentices to certain wages and fringe benefits."

In May 1985, the County of Santa Clara awarded Weisscal a contract for the San Jose Transit Mall Light Rail Project (the Project). On July 25, 1985, pursuant to Labor Code section 1777.5,[2] Weisscal signed a "DAS 7" form "Agreement to Train Apprentices" (the DAS 7 agreement.)[3] Under the DAS 7 agree-

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[2] Unless otherwise indicated further undesignated statutory citiations refer to the Labor Code.

[3] "DAS" stands for the "Division of Apprenticeship Standards."

Section 1777.5 states: "Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

"Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he or she is employed, and shall be employed only at the work of the craft or trade to which he or she is registered.

"Only apprentices, as defined in Section 3077, who are *in training under apprenticeship standards and written apprentice agreements* under Chapter 4 (commencing with Section 3070) of Division 3, are eligible to be employed on public works. *The employment and training of each apprentice shall be in accordance with the apprenticeship standards and apprentice agreements under which he or she is training.*

"When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him or her, in performing any of the work under the contract or subcontract, employs workers in any apprenticeship craft or trade, *the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected.* However, approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. Every contractor and subcontractor shall submit contract award information to the applicable joint apprenticeship committee which shall include an estimate of journeyman hours to be performed under the contract, the number of apprentices to be employed and the approximate dates the apprentices will be employed. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. *The ratio of work performed by apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but, except as otherwise provided in this section, in no case shall the ratio be less than one hour of apprentices work for every five hours of labor performed by a journeyman.* . . .

Any ratio shall apply during any day or portion of a day when any journeyman, or the higher standard stipulated by the joint apprentice-

ship committee, is employed at the job site and shall be computed on the basis of the hours worked during the day by journeymem so employed, except for the land surveyor classification. *The contractor shall employ apprentices for the number of hours computed as above before the end of the contract.* However, the contractor shall endeavor, to the greatest extent possible, to employ apprentices during the same time period that the journeymen in the same craft or trade are employed at the job site. Where an hourly apprenticeship ratio is not feasible for a particular craft or trade, the Division of Apprenticeship Standards, upon application of a joint apprenticeship committee, may order a minimum ratio of not less than one apprentice for each five journeymen in a craft or trade classification.

The contractor or subcontractor, if he or she is covered by this section, upon the issuance of the approval certificate, or if he or she has been previously approved in the craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he or she employs apprentices in the craft or trade in the state on all of his or her contracts on an annual average of not less than one hour of apprentice work for every five hours of labor performed by a journeyman, or in the land surveyor classification, one apprentice for each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from 1-to-5 hourly ratio as set forth in this section. This section shall not apply to contracts of general contractors or to contracts of specialty contractors not bidding for work through a general or prime contractor, when the contracts of general contractors or those specialty contractors involve less than thirty thousand dollars ($30,000] or 20 working days. Any work performed by a journeyman in excess of eight hours per day or 40 hours per week, shall not be used to calculate the hourly ratio required by this section.

'Apprenticeable craft or trade,' as used in this section, means a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations perscribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

"(a) Unemployment for the previous three-month period in the area exceeds an average of 15 percent.

"(b) The number of apprentices in training in such area exceeds a ration of 1 to 5.

ment, Weisscal agreed to "train apprentices [as Operating Engineers] in accordance with the apprenticeship standards and apprenticeship agreement and to comply with the provisions thereof." The JAC agreed to provide apprentices and the State of California, Department of Industrial Relations, Division of Apprenticeship Standards, approved the agreement.

According to the complaint, Weisscal failed to pay certain wages and fringe benefits required under the Trust Fund agree-

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"(c) There is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either on a statewide basis, or on a local basis.

"(d) Assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his or her life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

". . . . . .

"*A contractor to whom the contract is awarded, or any subcontractor under him or her, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he or she employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do,* but where the trust fund administrators are unable to accept the funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of the contributions in computing his or her bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of the contributions to the fund or funds as set forth in Section 227.

"*The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section.* The stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor." (Emphasis added.)

ment and section 1777.5. Weisscal also allegedly failed to hire apprentices as required under the DAS 7 agreement and section 1777.5.

On February 19, 1988, the JAC sued Weisscal and its license and payment bond sureties.[4] On May 31, 1988, the JAC filed its first amended complaint against the same parties. It sought $110,440.96 in unpaid trust fund contributions and interest and $27,610.24 in liquidated damages for the failure to hire the apprentices.

Weisscal and one of the sureties demurred on the grounds that ERISA preempted the cause of action against them.[5] The trial court agreed and sustained the demurrer without leave to amend. On October 28, 1988, after denying the JAC's motion for reconsideration, the court dismissed the complaint against Weisscal. This timely appeal followed.

DISCUSSION

The sole issue presented is ERISA's preemptive impact upon the JAC's cause of action. In Hydrostorage v. Northern Cal. Boilermakers, supra, 891 F.2d 719, the Ninth Circuit considered a similar case. We draw upon the court's opinion to place our dispute in its legal context.[6]

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[4] The complaint alleged that Surety Company of the Pacific executed a $5,000 contractor's license bond for Weisscal. Surety Company of the Pacific is not party to this appeal.

The complaint alleged that Fidelity and Deposit Corporation executed a payment bond for Weisscal. Fidelity and Deposit Corporation is a respondent herein.

[5] Weiscal and Fidelity and Deposit Corporation separately demurred. Surety Company of the Pacific, however, had answered the initial complaint.

[6] Weisscal has moved this court to take judicial notice of *Hydrostorage*. The case came down after the parties before us completed their appellate briefing. We directed supplemental briefing on the Ninth Circuit opinion's analytical impact upon the case before us.

"The State of California imposes certain conditions relating to apprentices upon contractors and subcontractors who perform contracts awarded by the state or its political subdivisons. (See Cal. Labor Code, § 1777.5 (West Supp. 1989.) Under section 1777.5 of the California Labor Code, contractors, with certain exceptions not relevant to this case, must (1) 'apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected'; (2) employ apprentices in a ratio of no less than one apprentice for every five journeymen; and (3) 'contribute to the fund or funds in each craft or trade in which [the contractor] employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do.' *(Id.)* As for the contribution requirement, if apprenticeship 'trust fund administrators are unable to accept [the] funds, contractors not signatory to the trust agreement' must pay 'a like amount to the California Apprenticeship Council.' *(Id.)*

". . . . . .

"For willful noncompliance with section 1777.5's requirements, a contractor is subject to civil penalties and debarment from bidding on public works contracts for one year. *(Id.)* (§ 1777.7.)" *Hydrostorage,* supra, 891 F.2d at pp. 721-722; fn. omitted.)

Disputes such as those in both *Hydrostorage* and the case before us arise when non-union contractors sign public works contracts. Where a contractor has signed a collective bargaining agreement with an apprenticeable union, that agreement requires the contractor to abide by the relevant apprenticeship standards

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Normally, when a party who has finished breifing wishes to alert this court to a subsequent decison, that party need only address a letter to this court's clerk (served on any other party) with the citation. Such an informal procedure avoids the cost of a formal motion under Evidence Code section 452. Given our resolution of the case before us, it must be evident to all who read this opinion, that we have "granted" Weisscal's motion.

(the standards) for the covered trades. (*Id.* at p. 721.) In such cases, the collective bargaining agreement provides a consensual framework directly incorporating the relevant standards into any given contract. ERISA preemption would only arise to the extent that section 1777.5 imposes requirements not otherwise found within the agreed standards. To date, no reported case has involved such a preemption argument.

Where, as with Weisscal and Hydrostorage, Inc., the contractor has *not* signed the relevant collective bargaining agreement, then section 1777.5 requires the contractor to agree to be bound by the relevant apprenticeship standards for the covered trade. In effect, the statute sets up a scheme to compel non-union employers to join or comply with the relevant apprenticeship standards. *Hydrostorage* concluded that ERISA preempted such legally coerced compliance with such standards.

Hydrostorage summarized ERISA's relevant parts: "ERISA is a 'comprehensive remedial statute "designed to protect the interest of employees in pension and welfare plans, and to protect employers from conflicting and inconsistent state and local regulation of such plans." ' (Local Union 598, Plumbers & Pipefitters Industry Journeymen & Apprentices Training Fund v. J.A. Jones Construction Co., 846 F.2d 1213, 1217 (9th Cir.) (Jones), aff'd, ____ U.S. ____, 109 S.Ct. 210, 102 L.Ed.2d 202 (1988), quoting Scott v. Gulf Oil Corp., 754 F.2d 1499, 1501 (9th Cir. 1985).) The statute 'sets forth reporting and disclosure obligations for plans, imposes a fiduciary standard of care for plan administrators, and establishes schedules for the vesting and accrual of pension benefits.' (Massachusetts v. Morash, ____ U.S. ____ 109 S.Ct. 1668, 1671-72, 104 L.Ed.2d 98 (1989) (Morash).)

"ERISA governs 'employee benefit plans,' which are statutorily defined as plans that are either an 'employee welfare benefit plan,' an 'employee pension benefit plan,' or both (29 U.S.C. § 1002(3); *Morash*, 109 S.Ct. at 1672.) The statute defines 'employee welfare benefit plan' as follows: "Any *plan, fund, or program* which was heretofore or is hereafter established or maintained by an employer or by an employee organization, or by both, to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or

their beneficiaries, through the purchase of insurance *or otherwise*, (A) medical, surgical, or hospital care or benefits, or benefits in the event of sickness, accident, disability, death or unemployment, or vacation benefits, *apprenticeship or other training programs*, or day care centers, scholarship funds, or prepaid legal services. . . ." (29 U.S.C. § 1002(1); emphasis added.)[7]

"ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. § 1144(a), provides that ERISA 'shall supersede any and all State laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . .' (29 U.S.C. § 1144(a) (emphasis added).) 'State laws' are defined as 'all laws, decisions, rules, regulations, or other State action having the effect of law, of any State.' (29 U.S.C. § 1144(c)(1).) A 'state' is defined as 'a State, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans covered by this subchapter.' (29 U.S.C. § 1144(c)(2).)

"Several exceptions exist to ERISA's broad preemption clause. Only one such exception is relevant to this case, however: ERISA's so-called 'savings clause.' Section 514(d) of ERISA, codified at 29 U.S.C. § 1144(d), provides that '[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law.' (29 U.S.C. § 1144(d).)" (*Hydrostorage*, supra, 891 F.2d at P. 726.)

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[7] ERISA provides for civil enforcement of its provisions. "A civil action may be brought—(1) by a participant or beneficiary—[¶] (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan; . . . [¶] (3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan or (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) enforce any provisions of this subchapter or other terms of the plan; . . ." (29 U.S.C. § 1132.)

The Ninth Circuit continued: "ERISA does not define the terms 'plan,' 'fund,' 'program,' or 'apprenticeship training program.' (See *Morash,* 109 S.Ct. at 1672.) Regulations issued by the Secretary of Labor under authority delegated by statute similarly fail to define these terms. (See 29 C.F.R. § 2510.3-1 (1988); 29 U.S.C. § 1135.) Moreover, of the very few reported decisions involving ERISA and apprenticeship funds or programs, none defines or analyzes the term 'apprenticeship training program.' In the absence of such guidance, we 'must give effect to [the statute's] plain language unless there is good reason to believe Congress intended the language to have some more restrictive meaning.' (Shaw, 463 U.S. at 97, 103 S.Ct. at 2900; See also *id.* at 97 fn. 16, 103 S.Ct. at 2900 fn. 16; quoting Black's Law Dictionary definitions in determining the meaning of phrase 'relates to' in ERISA's preemption clause).)" (*Hydrostorage,* supra, 891 F.2d at p. 727.)

Hydrostorage presented the Ninth Circuit with a suit by an employer who had signed a public works contract but had failed both to execute a DAS 7 agreement and to hire apprentices on its project in accordance with the relevant apprenticeship standards. (*Id.* at pp. 722-723.) After a hearing, the California Apprenticeship Council's Appeal Board concluded that the employer, Hydrostorage, had "willfully failed to apply for approval to train apprentices." (*Id.* at p. 723.) It "ordered Hydrostorage barred from bidding on public works contracts for one year and assessed a civil penalty." (*Ibid.*) Hydrostorage then sued and claimed that ERISA preempted the Council's order. (*Ibid.*)

After setting forth the above quoted legal background, the Ninth Circuit concluded that the case before it involved two ERISA plans. Under authority of *Jones,* supra, 846 F.2d at p. 1217, and the parties' stipulation, the court easily concluded that the trust fund before it was an ERISA employee benefit plan. (*Hydrostorage,* supra, 891 F.2d at pp. 727-728.) The court then turned to the status of the relevant apprenticeship standards themselves under ERISA: "A more difficult question is whether the Standards constitute an 'employee welfare benefit plan,' i.e., a 'plan' or 'program' which was 'established or maintained by an employer or by an employee organization, or by both, . . . for the

purpose of providing for its participants . . . apprenticeship or other training programs.' (29 U.S.C. § 1002(1).) We conclude that the Standards satisfy this definition. The Standards consist of a detailed, 16-page document which specifies the duties and procedure of the Committee, the minimum qualifications of apprentices, the maximum ratio of apprentices to journeymen on job locations, the terms and conditions of apprenticeships, and the hours and wages of apprentices. The Standards also provide for supplemental instruction as well as period examination of apprentices. The Standards clearly embody 'a method of design or action, procedure, or arrangement for accomplishment of a particular . . . object,' in this case the training of apprentices. (Black's Law Dictionary 1036 (5th ed. 1979).) In addition, there is no question that the Standards were established 'for the purpose of providing for its participant . . . apprenticeship or other training programs.' (29 U.S.C. § 1002(1).) The Standards' stated purpose is 'the training of Boilermakers, skilled in all phases of the erection and repair industry, who will be a credit to the industry.' Finally, the Standards were established by the Committee, an entity created by the collective bargaining agreement and composed of equal numbers of representatives of labor and management. As such, the Committee qualifies as 'an employer or . . . employee organization, or . . . both.' *(Id.)*

"The Standards are an integral part of a larger 'program' established for the purpose of providing 'apprenticeship . . . training.' *(Id.)* Thus, both the Fund and the Standards fall within the definition of an 'employee welfare benefit plan' under ERISA." (*Hydrostorage,* supra, 891 F.2d at p. 728.)[8]

After concluding that the case did involve ERISA covered employee welfare benefit plans, the court then reviewed whether

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[8] The Court did not decide "whether the Committee itself, whose functions include the formulation and administration of the Standards, is also part of the employee welfare benefit plan. The Division strenuously argues that while the Fund is an ERISA plan, the Committee is not. The resolution of this issue has no bearing on our decision. Since the Standards and Fund constitute an ERISA plan, this case clearly falls within the coverage of ERISA." *(Ibid.)*

the administrative order was a "State law" that "relate[s] to" such a plan. (*Id.* at p. 729.) The court quickly determined that the order was a "state law" under ERISA *(Ibid.)* It continued: "More difficult is the issue of whether the administrative order 'relates to' an ERISA employee benefit plan. We have required that a state law both 'relate to,' (29 U.S.C. § 1144(a)) and 'purport[ ] to regulate, directly or indirectly,' (29 U.S.C. § 1144(c)) and employee welfare benefit plan in order for it to be preempted. (*Jones,* 846 F.2d at 1218; *Martori,* 781 F.2d at 1356.) ' "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." ' (*Shaw,* 463 U.S. at 96-97, 103 S.Ct. at 2899-900.) A law purports to regulate a plan if it attempts to reach in one way or another the terms and conditions of employee benefit plans. (*Jones,* 846 F.2d at 1218, Lane v. Goren, 743 F.2d 1337, 1339 (9th Cir. 1984).)" (*Hydrostorage,* supra, 891 F.2d at p. 729.)

The court first found that the order "clearly 'relates to' the Standards, which are part of an ERISA plan." (*Ibid.*) The order penalized Hydrostorage for failing to sign the DAS 7 agreement. (*Id.* at p. 730.) Under that agreement, Hydrostorage would have been bound to fulfill the pertinent apprenticeship standards. As such, the court concluded that "the order undoubtedly 'relates to' an ERISA plan in the sense that the order has a 'connection with or reference to' the Standards." (*Ibid.*)

The court then found that the order " 'purports to regulate, indirectly or directly,' an ERISA plan." (*Ibid.*) It stated: "Again, the order's purpose is to require Hydrostorage and other contractors on public works projects to become bound by the Standards, an ERISA plan. [Citation.] The order is designed to enforce the terms of an ERISA plan. The same is true of the statute upon which the order is based, California Labor Code § 1777.5. *Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans.* The underlying statute is therefore one which is specifically designed to affect employee benefit plans. [Citation.] We therefore conlcude that the administrative order falls within ERISA's preemption clause." (*Ibid.*) (Emphasis added.)

Finally, the court concluded that ERISA section 514(d) did not save the order from preemption. (*Id.* at p. 730-732.) That section, codified at 29 U.S.C. section 1144(d), states that courts should not construe ERISA "to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." In particular, the court rejected a claim that the state apprenticeship standards had been incorporated into the federal regulatory scheme under the Fitzgerald Act, 29 U.S.C. § 50.[9] (*Ibid.*) The court found that Fitzgerald Act did not "embod[y] a project in 'cooperative federalism' which will be 'impaired' or 'modified' within the meaning of section 514(d) if the administrative order against Hydrostorage were preempted by ERISA."[10] (*Id.* at p. 732.)

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[9] That act provides: "The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship. . . . " (29 U.S.C. § 50.)

The court summarized: "These apprenticeship standards are set forth at 29 C.F.R. § 29.1-29.13 (1988). The regulations provide 'a detailed regulatory scheme defining apprenticeship programs and their requirements, and establish a review, approval and registration process for proposed apprenticeship programs administered by State Apprenticeship Councils under the aegis of the United States Department of Labor.' [Citation.]" (*Hydrostorage*, supra, 891 F.2d at p. 731.)

[10] In reaching its conclusion, the Ninth Circuit adopted the district court's reasoning. (*Hydrostorage*, supra, 891 F.2d at p. 731.) The district court summarized: " 'The Fitzgerald Act merely directs the Secretary of Labor 'to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices' and related objectives. (29 U.S.C. § 50.) The implementing regulations state that their purpose is 'to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures concerning the registration, for certain Federal purposes, [of] acceptable apprenticeship programs.' (29 C.F.R. § 29.1(b).) Thus the regulations relate only to eligibility for federal

Our extensive discussion of *Hydrostorage* demonstrates the great similarity between that case and the case before us. Both cases involve the attempt to enforce section 1777.5 and bind a non-signatory employer to the terms of a collectively bargained apprenticeship trust fund and standards covered by ERISA. *Hydrostorage* found that ERISA preempted administrative enforcement of section 1777.5 under such circumstances. We find the Ninth Circuit's analysis persuasive and adopt its reasoning.[11]

The JAC attempts to distinguish *Hydrostorage* in several ways. First, it argues that its common law breach of contract action differs markedly from the administrative order in *Hydrostorage*. We disagree. Both actions seek to bind a non-signatory employer to the terms of a collectively bargained apprenticeship trust fund and standards covered by ERISA. The complaint alleges the contract was entered into pursuant to the requirements of California Labor Code, section 1777.5. We would exalt form over substance if we were to conclude that the JAC may enforce its standards and trust fund contribution requirements *indirectly* while the state could not enforce the same standards and trust fund contribution requirements directly.

Moreover, the action's common law origin gives the JAC no special immunity from ERISA's preemptive scope. ERISA expressly defines preempted "state laws" to include "decisions . . . of any State." (29 U.S.C. § 1144, subd. (c)(1).) "State" includes any state "agency or instrumentality." (*Id.* at subd. (c)(2).) Thus, judicial decisions fit within ERISA's preemptive scope.

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registration. Neither they nor the Act itself contemplate enforcement mechanisms; Section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming § 1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under this section are preempted by ERISA, federal law is not impaired.' " (*Ibid.*)

[11] Contrary to Weisscal's suggestion, we are not bound to follow Ninth Circuit opinions. (See 9 Witkin, Cal. Procedure (3d ed. 1985) Appeal, § 781, p. 751 ["the prevailing view appears to be that the decisions of the lower federal courts, although entitled to great weight, are not binding on state courts"].)

Indeed, the United States Supreme Court has not hesitated to find state common law remedies preempted under ERISA. (See, e.g., Pilot Life Insurance Co. v. Dedeaux (1987) 481 U.S. 41, 47-48 [ERISA preempted common law tort and contract claims for failure to pay insurance benefits].)

Second, the JAC notes that Weisscal signed the DAS 7 "agreement" while Hydrostorage did not. Again, we fail to perceive a meaningful distinction. As noted in *Hydrostorage*, ERISA preempts attempts under state law to enforce the terms of an ERISA plan. (*Hydrostorage*, supra, 891 F.2d at p. 730.) Like an administrative attempt to force an employer to sign a DAS 7 agreement, the common law attempt to enforce such an agreement both "relates to" and "purports to regulate" an ERISA plan. It "relates to" an ERISA plan because the DAS 7 agreement specifically requires adherence to an ERISA plan, i.e., the applicable apprenticeship standards. (*Ibid.*) It "purports to regulate, directly or indirectly" an ERISA plan because it aims "[to compel] nonsignatory contractors to join or comply with such plans." (*Ibid.*) As such, we perceive no meaningful distinction between the two situations.

Similarly, we reject the JAC's argument that Weisscal is not an "employer" under ERISA. The JAC argues that since Weisscal is not an "employer" under ERISA, this case does not involve an ERISA employee welfare benefit plan. Rather, it claims that Weisscal is but a nonfiduciary plan service provider.

In *Hydrostorage*, the Ninth Circuit found it unnecessary to determine if that company was an "employer" under ERISA. We, too, find it unnecessary.[12] As in *Hydrostorage*, the case before us involves an ERISA employee welfare benefit trust fund and a set of apprenticeship standards. Since, under *Hydrostorage*, the apprenticeship standards are also ERISA welfare benefit plans, it becomes irrelevant whether the JAC seeks to enforce them against a non-ERISA employer. Or, rather, the very at-

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[12] In both the original and the first amended complaint, the JAC alleged that Weisscal *is* an ERISA "employer." Because we find it unnecessary to reach the issue, we also do not consider the legal impact of these allegations.

tempt to force a non-ERISA employer to adhere to ERISA plans triggers ERISA's preemptive impact. (*Ibid.*)[13]

Finally, for the reasons given in *Hydrostorage*, we also reject the JAC's claim that the Fitzgerald Act has incorporated California apprenticeship standards into the federal apprenticeship standards regulatory scheme as a cooperative enforcement mechanism.

Our opinion does not condone ERISA's impact upon California's attempts to require all public works contractors to hire apprentices and support their training. But we must also conclude, with the Ninth Circuit, that complaints about ERISA's preemptive sweep belong only before Congress. (See *id.* at pp. 728-729.)

Accordingly, we conclude that ERISA preempts a breach of contract action to enforce a DAS 7 agreement executed by an employer who had not signed the collective bargaining agreement that created the applicable apprenticeship standards and trust fund. We express no other opinion on the preemptive impact of ERISA on section 1777.5.

DISPOSITION

We affirm the judgment. (CERTIFIED FOR PUBLICATION)

DAVIS, J.

We concur:

PUGLIA, P.J.

SPARKS, J.

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[13] Similarly, we need not rule whether the JAC is itself an ERISA employee welfare benefit plan. (See *Hydrostorage*, supra, 891 F.2d at p. 728.)

Appendix C

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Attorneys for Defendant
Fidelity and Deposit Company
of Maryland

In the Superior Court of the State of California
In and for the County of Sacramento

Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, The Operating Engineers Joint Apprenticeship Committee for Northern California on behalf of itself and on behalf of injured apprentices,
Plaintiffs,

v.

Weiss Brothers Construction dba Weisscal; David Weiss; Alan Weiss, Fidelity and Deposit Company of Maryland, Surety Company of the Pacific; and Does 1 through 10, inclusive,
Defendants.

NO. 500698

ORDER FOR ENTRY OF JUDGMENT OF DISMISSAL OF WEISS BROTHERS CONSTRUCTION COMPANY, INC., dba WEISSCAL, DAVID WEISS, ALAN WEISS AND FIDELITY AND DEPOSIT COMPANY OF MARYLAND

[ENDORSED: OCTOBER 28, 1988]

The demurrer of defendants Weiss Brothers Construction Company, Inc. dba Weisscal, David Weiss and Alan Weiss (hereinafter collectively referred to as "Weisscal") to the first cause of action of Plaintiffs' first amended complaint, and the

demurrer of Fidelity and Deposit Company of Maryland (hereinafter "Fidelity") to the first and third causes of action of Plaintiffs' first amended complaint, having come before the court on June 27, 1988, and having been sustained without leave to amend, and Plaintiffs' motion for Reconsideration or Relief from Order having come before the court on September 19, 1988 and having been denied, and

Wherefore, for good cause shown

IT IS HEREBY ORDERED that the action against Weisscal and Fidelity be and hereby is DISMISSED.

Dated: October 28, 1988.

ANTHONY DeCRISTOFORO, JR.
Judge
Sacramento County Superior Court

Appendix D

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Superior Court of the State of California
County of Sacramento

Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, The Operating Engineers Joint Apprenticeship Committee for Northern California on behalf of itself and on behalf of injured apprentices,
Plaintiff,

v.

Weiss Brothers Construction dba Weisscal; David Weiss; Alan Weiss, Fidelity and Deposit Company of Maryland, Surety Company of the Pacific; and Does 1 through 10, inclusive,
Defendants.

[ENDORSED: OCTOBER 13, 1988]

NO. 500698
ORDER
Hearing Date: 9/19/88 continued to 10/4/88
Location: Department 27; Judge Darrel W. Lewis

This matter came before the Court on September 19, 1988 at 9:00 a.m. in Department 27 before Judge Darrel W. Lewis.

Having considered the pleadings, papers and records on file herein, oral arguments by counsel, and having taken this matter under submission until October 4, 1988, the Court rules that, (a) plaintiffs' motion for Relief from Order set forth no excusable

neglect, mistake, surprise or inadvertence, (b) plaintiff's motion for reconsideration was timely, however, (c) there is no legal basis for granting plaintiffs leave to file a second amended complaint, and (d) defendants' requests for sanctions failed to set forth an amount requested. Accordingly,

IT IS HEREBY ORDERED; plaintiffs' motion for Reconsideration or Relief from Order is DENIED and defendants request for sanctions are DENIED.

Dated: October 13, 1988

DARREL W. LEWIS
Judge, Sacramento County
Superior Court

Appendix E-(1)

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dba Weisscal and David Weiss

In the Superior Court of California
For the County of Sacramento

Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, The Operating Engineers Joint Apprenticeship Committee for Northern California on behalf of itself and on behalf of injured apprentices,
Plaintiffs,

v.

Weiss Bros. Construction dba Weisscal; David Weiss; Allen Weiss, Fidelity and Deposit Company of Maryland, Surety Company of the Pacific; and Does 1 through 10, inclusive,
Defendants.

No. 500698

Order Sustaining Weiss Bros. Construction dba Weisscal and David Weiss' Demurrer and Denying Motion for Disqualification as Moot

Date: June 27, 1988
Time: 9:00 a.m.
Dept.: 28

[ENDORSED AUGUST 9, 1988]

This matter came before the Court on June 27, 1988, at 9:00 a.m. in Department 28 before Judge Darrel W. Lewis.

Having read and considered the demurrer filed by defendant Weiss Bros. Construction, dba Weisscal and David Weiss, the

supporting memoranda of points and authorities and plaintiffs' opposition, the parties having waived oral argument and having been sufficiently advised, the Court rules that plaintiffs' First Amended Complaint is preempted by the Employee Retirement Income Security Act. Accordingly,

IT IS ORDERED that defendants Weiss Bros. Construction Company, dba Weisscal and David Weiss' demurrer to the first cause of action of the First Amended Complaint be and is hereby SUSTAINED without leave to amend;

AND FURTHER ORDERED that all other grounds for the demurrer and the motion for disqualification be and are hereby DENIED as moot.

Dated: August 9, 1988

DARREL W. LEWIS
Judge Darrel W. Lewis
Superior Court Judge

Appendix E-(2)

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Superior Court of the State of California
County of Sacramento

Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, The Operating Engineers Northern California on behalf of itself and on behalf of injured apprentices,
Plaintiff,

v.

Weiss Bros. Construction dba Weisscal; David Weiss; Allen Weiss, Fidelity and Deposit Company of Maryland, Surety Company of the Pacific; and Does 1 through 10, inclusive,
Defendants.

No. 500698
ORDER

[ENDORSED: JULY 22, 1988]

This matter came before the court on June 27, 1988, at 9:00 a.m. in Department 28 before Judge Darrel W. Lewis.

Having considered the pleadings, papers and records on file herein, the parties having waived oral arguments and having been sufficiently advised, the Court rules that plaintiff's First Amend Complaint is preempted by the Employee Retirement Income Security Act. Accordingly,

IT IS HEREBY ORDERED; that the demurrer of defendant Fidelity and Deposit Company of Maryland to the first and third causes action of the First Amend Complaint be and hereby is SUSTAINED without leave to amend.

Dated: July 22, 1988.

DARREL W. LEWIS
Judge,
Sacramento County Superior Court

Appendix F

I, *Ramona A. Malinowski,* declare that I am employed by the Division of Apprenticeship Standards of the Department of Industrial Relations of the State of California and that the attached

PROPOSED DECISION OF THE CALIFORNIA APPRENTICESHIP COUNCIL APPEAL BOARD

in case #PW 217-86-4 is a true and accurate copy of the original decision that is on file with Department of Industrial Relations.

Executed on April 3, 1989 at San Francisco, California.

/s/ RAMONA A. MALINOWSKY

Before the California Apprenticeship
Council Appeal Board

Weiss Brothers Construction Company,
Incorporated, dba
Weisscal Company; Alan Mark Weiss,
individually, and
David Gene Weiss, individually,

Appellants,

vs.

Administrator's Determination in the
Matter of
the Complaint of Gail W. Jesswein, Chief,
Division of Apprenticeship Standards of the
Department of Industrial Relations; and
Operating Engineers Joint Apprenticeship
Committee, Northern California,

Respondents.

Gail W. Jesswein, Chief, Division of
Apprenticeship Standards of the Department
of Industrial Relations; and Operating Engineers
Joint Apprenticeship Committee, Northern California,

Real Parties in Interest.

No. PW 217-86-4

PROPOSED DECISION OF THE CALIFORNIA APPRENTICESHIP COUNCIL APPEAL BOARD

Weiss Brothers Construction Company, Incorporated, dba Weisscal Company; Alan Mark Weiss, individually, and David Gene Weiss, individually, original respondent herein, appealed from the Determination of the Administrator of Apprenticeship dated April 14, 1988.

Pursuant to Title 8, California Administrative Code, section 203(a)(1), the Chairman of the California Apprenticeship Council appointed Florence Rhoads, George Harter and Richard

Harden to act as Appeal Board to make a Proposed Decision concerning this appeal. Pursuant to Labor Code section 3082, the Appeal Board determined that it could decide the appeal without the necessity of conducting a hearing and so notified the parties by letter dated July 5, 1988.

After considering the entire record of the proceedings before the Administration of Apprenticeship, the Appeal Board recommends that the Determination of the Administrator of Apprenticeship, a copy of which is attached hereto as Exhibit A and incorporated herein by reference, be sustained and adopted in its entirety.

Dated: July 28, 1988 /s/ FLORENCE RHOADS
Florence Rhoads
Chairperson, Appeal Board

Dated: July 28, 1988 /s/ GEORGE HARTER
George Harter
Member, Appeal Board

Dated: July 28, 1988 /s/ RICHARD HARDEN
Richard Harden
Member, Appeal Board

EXHIBIT A

State of California
Department of Industrial Relations
Administrator of Apprenticeship

Gail W. Jesswein, Chief, Division of Apprenticeship Standards of the Department of Industrial Relations; and Operating Engineers Joint Apprenticeship Committee, Northern California,
Complainants,
v.
Weiss Brothers Construction Company, Incorporated, dba Weisscal Company; Alan Mark Weiss, individually, and David Gene Weiss, individually,
Respondents.

DETERMINATION

Case No. PW 217-86-4

This case came on for hearing on July 14, 1987; September 29, 1987; September 30, 1987; October 1, 1987; October 16, 1987; and October 27, 1987 in San Jose, California, pursuant to a letter complaint filed by the Operating Engineers Joint Apprenticeship Committee, Northern California (hereinafter "JAC") and pursuant to a Complaint filed by Gail W. Jesswein, Chief, Division of Apprenticeship Standards (hereinafter "DAS") on or about June 27, 1987.

Evidence and argument, both oral and written, were heard by Susan V. Hamilton, the designated Hearing Officer for the Administrator of Apprenticeship. The parties requested and were allowed to file post-hearing briefs. The administrative hearing record closed on February 19, 1987.

References to the exhibits filed in this matter and testimony are as follows:

Exhibits — Documentary evidence submitted by the parties is referred to first by identification of the party, and second, by exhibit number. For example, exhibits of JAC are designated as, "OE1".

Testimony — Testimony of witnesses is referred to by reference to the transcript, and the page (e.g., "Tr. Vol. 1, p. 1").

APPEARANCES

The following attorneys appeared for the litigants at the hearing:

For the Complainant, DAS, Ira Kalinsky, Esq.

For the Complainant, JAC, Lawrence H. Kay, Esq. of Stanton and Kay.

For the Respondent, Weisscal Construction Company, Inc., *et al.*, Richard J. Tomoda, Esq., from the law firm of Corbett & Kane.

ISSUES

JAC alleges that Weisscal willfully violated the provisions of Labor Code section 1777.5 in that it:

1. Failed to contribute to the training trust fund in a timely manner; and

2. Failed to employ the required ratio of apprentices to operating engineer journeyman throughout all but a small portion of the Project.

DAS alleges that Weisscal willfully violated the provisions of Labor Code section 1777.5 in that it:

1. Failed to apply to JAC for a certificate to train apprentices in the trade of operating engineer until July 25, 1985, notwithstanding the fact that the contract was awarded on April 30, 1985;

2. Failed to make contributions to the apprentice training trust fund; and

3. Failed to employ apprentices in the appropriate ratio to operating engineer journeymen at various times throughout the period of performance of the contract.

During the course of the hearing, Weisscal raised two motions. The first motion sought disqualification of attorney Lawrence H.

Kay, Esq. and the law firm of Stanton & Kay on the basis that Mr. Kay formerly represented Weisscal in another matter. The second motion sought dismissal of the entire action on the basis of violations by DAS of regulatory guidelines and laches, effectively depriving Weisscal of its rights to due process. The Hearing Officer treated both motions as preliminary threshold issues, and after consideration, denied both.

THE HEARING OFFICER WAS CORRECT IN DENYING WEISSCAL'S MOTION TO DISQUALIFY JAC COUNSEL

On September 29, 1987,[1] Weisscal filed a Motion to disqualify attorney Lawrence Kay ("Kay"), counsel for the JAC. The Motion was premised on the fact that Kay once represented Weisscal, and was supported by a Declaration from David Weiss. That Declaration provides in pertinent part:

> "During February to April 1985, I engaged Lawrence H. Kay, Esq. of the law firm of Stanton & Kay to provide legal services for the San Jose project.
>
> As a client, I discussed with Mr. Kay a variety of issues concerning the transit mall project and the application of California laws to the operation of the project. The issues included but were not limited to licensing requirements, bidding, and union status.
>
> I am aware that Mr. Kay provides legal representation for the Operating Engineers Joint Apprenticeship Committee, Northern California (hereafter, "JAC") which has filed an apprenticeship complaint against Weisscal."

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[1]The hearing began July 14, 1987. After a half-day session, the hearing was recessed to allow Weisscal's counsel to obtain certain information and to enable the parties to engage in discussions. Tr. Vol. 1, p. 29.

Both JAC and DAS opposed the Motion, and Kay made an offer of proof as regards his former representation. The offer of proof is as follows:

> Basically, in a nutshell, the position that our firm was involved in is, Neal O'Donnell, counsel for Weisscal Company — and again, I'm a little at a loss here because I don't have my files or anything relating to our representation — but it was sometime — I believe the declaration of Mr. Weiss says during the period of February to April, 1985, we were engaged. We were contacted by Mr. Weiss' attorney, who was having problems with the State Contractors License Board in getting Mr. Weiss' license approved. And there were some concerns over questions that were answered on the license form relating to previous experience in other states. And we were asked to assist them, because of my previous dealing with the trade association — I was trial counsel for them, and I've had numerous dealings with the State Contractors License Board and had personal — many personal appearances before that board. We were asked to assist Neal O'Donnell in setting up meetings with the Contractors License Board and the registrar, which we did, and sat in those meetings with the registrar and attempted to assist his counsel to get the license for Weisscal. That was the specific purpose for which we were retained. We have not done any legal work for Weisscal other than that one, specific purpose, and I believe we had maybe two meetings during that period of time. Our bills for work performed and what was actually performed are, obviously, in our offices, in our files, but I don't have them here today, so that my position is that the work that we performed for Weisscal was in no way related to the hearings that are currently being held before you.

"Hearing Officer: Mr. Kay?

Kay: Madame Hearing Officer, at this point I would like to make a motion to dismiss the motion to disqualify counsel, on the basis that it is high[ly] prejudiced to our position, as counsel in this case. First of all, we have been involved with the Operating Engineers JAC and Weisscal Company since sometime in 1986, when I had a meeting with Mr. Weiss in his office in San Jose and a diffrerent law firm was representing Mr. Weiss at that time. Our involvement with the Operating Engineers JAC was presented to Mr. Weiss when we were retained by his office back in 1985. And I feel that the timeliness of this motion is quite unusual in the fact that the hearing started in July, and the hearings were opened at this point and at that point, no motion was raised to disqualify our firm. I think an argument could be made that a waiver was made at that point. The hearings were opening; this is a continuance of those hearings. The failure to raise it at that point, when common knowledge of our representation of Mr. Weiss was known by him and his counsel, so, to be served with a motion this morning puts us in a position where it's extraordinarily impossible to respond to in the few minutes I've had to read Mr. Tomoda's motion.

I have some response I'll put on the record, but initially, I'm making a procedural motion to dismiss it. And if the hearing officer denies my motion, then I'll go to the merits of it.

At the time we were working with Weiss and Weisscal Company in attempting to help them get their contractor's license, I did disclose to Mr. Weiss that we were counsel for the Operating Engineers Joint Apprenticeship Committee and that there were laws in California 1777.5, that he should be aware of and should be cognizant of the problems that could arise

under the apprenticeship laws if he hired operating engineers and then didn't comply with the law. And at the time when were performing the — were retained for the legal work relating to the Contractor's License Board matter, there was no disclosure by Mr. Weiss of any confidential information to me that related in any way to the San Jose project, because at that time, the San Jose project had not been awarded to Mr. Weiss. His award of the contract was being held up until this license matter was resolved. The job had not started. There was no requirements under 1777.5 at that time to comply with by Weisscal.

Therefore, since our employment was, in my opinion, not related to the issues of the hearing we have here today, and since I did not receive any confidential information that would be adverse to my former client, I do not believe Rule 4-101 is applicable to our representing the Operating Engineers Joint Apprenticeship Committee.

Furtheremore, the former representation of the Weisscal Company, since it does not relate to the current dispute, there is no substantial relationship here or no confidential nature of disclosure by Weisscal that would in any way prejudice the Weisscal Company by our maintaining the status of counsel for the JAC in this hearing. . . . " Tr. Vol. II, pp. 14-19

" . . . And I indicated in my offer of proof, and I will state it again, that I was never given any confidential information by Mr. Weiss during our representation on the License Board proceeding, . . . " Tr. Vol. III, p. 34

The Hearing Officer denied the Motion on two bases. First, that Weisscal failed to establish a substantial relationship between Kay's current representation of JAC and former representation of Weisscal. And second, on the basis of laches. (Tr. Vol. II,

pp. 61-44; Tr. Vol. III, pp. 31-33, 36-37). The Hearing Officer properly denied the Motion.

California State Bar Rule 4-101 prohibits an attorney from accepting employment adverse to a client or former client without the express written consent of the client or former client relating to a matter in reference to which he has obtained confidential information by reason of the current or former employment. This rule does not prohibit an attorney from accepting employment adverse to a former client if the subject matter of the present controversy is not substantially related to that of any former representation of the adverse party. *Elliott v. MacFarland Unified School District* (1985) 165 Cal.App.3d 562; 211 Cal.Rptr. 802. Thus, the principal inquiry is whether or not the former representation is substantially related to the current representation. *Global Van Lines v. Superior Ct.* (1983) 144 Cal.App.3d 483; 192 Cal.Rptr. 609. Although *actual* possession of confidential information need not be proved to disqualify an attorney from representing the adversary of a former client in litigation against the former client, the attorney's knowledge of confidential information is only presumed where:

> "... [a] substantial relationship has been shown to exist between the former representation and the current representation, ***and*** when it appears by virtue of the nature of the former representation or relationship of the attorney to his former client confidential information ***material to the current dispute*** would normally have been imparted to the attorney...."

Global Van Lines v. Superior Court, supra 114 Cal.App.3d 483 at 490 (Emphasis added.) *See also People Ex Rel Deukmejian v. Brown* (1981) 29 Cal.3d 150; 172 Cal.Rptr. 478.

Furthermore, the existence of a substantial relationship, including the nature of confidences that normally would have been imparted to the attorney, must be supported by more than conclusive allegations in a declaration *Elliott v. McFarland Unified School District, supra,* 165 Cal.App.3d 562 at 572.

The declaration of David Weiss is conclusive and fails to demonstrate a substantial relationship, including confidences im-

parted, between the present matter and Kay's former representation. Issues of licensing requirements, bidding and union status do not necessarily include matters of apprenticeship. Weisscal failed to offer any specific allegation that Kay's representation also extended to issues of apprenticeship, California apprenticeship requirements and the specific apprenticeship requirements on certain public works contracts. Nor does it allege that confidences concerning these subjects were imparted to Kay.

In contrast, Kay's offer of proof confirms the absence of a substantial relationship, including confidential communications, during his brief representation of Weisscal. It likewise supports the denial of the motion on the basis of laches.

Both *Global* and Deukmejian are factually distinguishable because the courts specifically found the existence of a substantial relationship was sufficiently proven. In *Global,* counsel knew top management strategy as a result of former representation. In *Deukmejian,* counsel discussed the merits of the pending litigation and possible defenses thereto before switching sides and suing the client on the same issue.

The Hearing Officer also properly denied the Motion on the basis of laches. In *River West, Inc. v. Nickel* (1987) 188 Cal.App.3d 1297, the court held that *even* if a substantial relationship is found to exist, a Motion to disqualify an attorney can be denied based on an unreasonable delay by the former client in making the Motion. *Elliott v. McFarland Unified School Dist., supra,* also frowned on such Motions being used as a tactical device for delay.[2] The party opposing the disqualification must offer prima facie evidence of unreasonable delay by the former client, resulting in prejudice to the current client. The burden then shifts back to the party seeking disqualification to justify the delay. *River West, Inc. v. Nickel, supra,* 188 Cal.App.3d 1297 at 1309.

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[2]In *McFarland,* the disqualification Motion was brought two days before trial. In this case, the Motion was filed on the second day of hearing.

In the present case, counsel for JAC offered proof that:

1. At time Kay agreed to represent Weisscal on the licensing matter he disclosed his ongoing representation of Operating Engineers JAC. (Tr. Vol. II, p. 15).

2. Weisscal should have known of a potential conflict when it received a letter from Kay on behalf of JAC regarding trust fund contributions due on the San Jose project. (OE LL).

3. The potential conflict was also brought to Weisscal's attention when it received notice of JAC's complaint on or about March 18, 1986. (DAS 35).

4. Weisscal was represented by counsel prior to and at all times after the dispute with the JAC and could have raised the Motion immediately.

5. JAC will be severely prejudiced by disqualification of Kay as counsel. (Tr. Vol. II, pp. 14-15; p. 31).

6. If Weisscal truly believed disqualification of Kay was necessary, it could have brought the Motion on or before July 14, 1987, when this hearing first began rather than waiting until September 29, 1987. An earlier brought Motion would have been more appropriate. (Tr. Vol. II, p. 15).

Kay's offer of proof fully made a prima facie showing of unreasonable delay, and Weisscal failed to offer any justification for the delay both at the time it brought the Motion (Tr. Vol. II, pp. 1-15; pp. 60-62) and the next day when it sought and was given an opportunity to renew the Motion. (Tr. Vol. III, pp. 22-31).

THE HEARING OFFICER DID NOT ERR IN DENYING WEISSCAL'S MOTION TO DISMISS COMPLAINT

Weisscal also moved[3] to dismiss the complaints filed against it by JAC and by DAS on the basis of delay on the part of DAS

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[3]Second day of Hearing, September 29, 1987.

(not JAC) in (1) notifying Weisscal of the JAC complaint against it; (2) filing its complaint against Weisscal, and (3) in setting the case for hearing.

Title 8, Cal.Admin. Code § 201(a) provides, in pertinent part:

"201. Filing of Complaints.

(a) Complaints may be filed by any interested person with the Administrator of Apprenticeship or the Administrator of Apprenticeship upon his/her own initiative may issue a complaint, within the time period specified below, when there is cause to believe that a decision, order or action of an apprenticeship program sponsor has been unfair or unreasonable; or that there has been a violation of:

* * *

(2) That portion of Chapter 1, Division 2, Section 1777.5 of the Labor Code delegated to the California Apprenticeship Council for interpretation and enforcement, 90 days;

* * *

(c) Upon receipt or issuance of a complaint the Administrator of Apprenticeship shall cause a copy of such complaint to be served upon the respondent(s)."

On December 13, 1985, JAC filed a complaint with DAS alleging that Weisscal was in violation of certain aspects of Labor Code § 1777.5 on the San Jose Transit Mall project. Notification of filing complaint was sent by DAS to Weisscal on March 18, 1986. On June 26, 1987, DAS filed its own complaint against Weisscal.

Addressing first the issue of delay in notifying Weisscal of the JAC complaint against it, I conclude that there was no violation by DAS of its regulations. Title 8, Cal.Admin. Code § 201(c) does not set a specific time limit for service of the complaint upon the respondent. The time interval in this case between the filing of the complaint and the notification was not unreasonable and did not violate the regulations.

After due consideration of Weisscal's second and third points (delay in filing DAS complaints and setting case for hearing), I likewise conclude that the motion to dismiss was properly denied.

Title 8 Cal.Admin. Code § 202(a) simply requires DAS to commence an investigation upon the receipt or issuance of a complaint to determine: (1) whether the complaint has merit and if further inquiry/investigation is appropriate; or (2) whether the complaint lacks merit. If the latter conclusion is reached, DAS has a 60-day time limit to dismiss the case. If it is determined that the complaint has merit, DAS is not given a specific time period within which to hold a hearing. Rather, § 202(b) gives DAS the discretion to do a number of things, including (1) attempt to resolve the problem between the parties; (2) persuade the respondent (party against whom the complaint is filed) to follow a particular course of action designed to achieve amicable resolution; or (3) continue investigation.[4] None of these activities are mutually exclusive. For example, DAS could continue a fact gathering role at the same time it is working with the parties to achieve settlement. And a hearing concerning the alleged violations is not required to be held until such time as DAS determines that the matter cannot be satisfactorily settled, or if the complaint is not dismissed or withdrawn.

In this case, DAS conducted an investigation of Weisscal following the filing of the JAC complaint, and continued to both monitor Weisscal's compliance with state apprenticeship law, and achieve a settlement of the controversy thereafter. (DAS-19, DAS-2, DAS-23 OEFF OENN). Senior Apprenticeship Consultant, Sheila Chase, met with David Weiss early on in the project before a complaint had been filed, and again on two occasions thereafter. Ms. Chase used these meetings as a way to explain legal requirements to Weisscal and assure their compliance (Tr. Vol. III, pp. 130-131, 160-161).

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[4]*Occidental Life Ins. Co. v. EEOC* (1977) 432 U.S. 355 97 S.Ct. 2447 wherein Supreme Court upheld agency interpretation that 180-day time limit to dismiss a charge or give notice of conciliation does not set a like time period for EEOC to pursue settlement and/or bring an enforcement action.

Thereafter, when DAS concluded that non-compliance was ongoing, and would probably not be corrected, it filed a complaint and set the case for hearing. This activity by DAS was in compliance with the procedural requirements of § 202.

Accordingly, DAS did not violate Weisscal's due process right.[5]

The Hearing Officer appropriately took into consideration the interests of JAC in analyzing whether the complaints should be dismissed. DAS regulations allow interested parties, such as JAC, to file complaints alleging violation of Labor Code § 1777.5.

Although it is not required by the regulations, frequently the DAS files its own complaint. Regardless of whether or not it is a complaining party in the case, DAS must conduct an investigation and may take appropriate steps to bring about an amicable resolution of the problem. The latter activities may require that a case remain in the investigatory/pre-settlement mode longer than JAC or other complaining party would like. Nonetheless, it is the DAS in conformance with its regulations who determines if and when a hearing should be scheduled.

Although in this case JAC filed its complaint in December of 1985, DAS did not conclude that a hearing should be held until approximately June 1987. JAC was not responsible for and did not have any part in determining what actions DAS would undertake to investigate and/or settle the complaint. It urged DAS to set the case for hearing. (Tr. Vol. VI, p. 147). Weisscal failed to demonstrate in what manner, if any, it was prejudiced by the time interval between complaint and hearing. At the time of hearing, the San Jose Transit Mall project was still ongoing and Weisscal remained obliged to prepare and submit certified payroll records per Labor Code § 1776 and to comply with Labor Code § 1777.5.

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[5]*U.S. ex rel Accorde v. Shaughnessy* (1954) (347 U.S. 260, and *U.S. Heffner* (4th Cir. 1970) 420 F.2d 809 are inapplicable because DAS did not violate Title 8 CAC §§ 201, 202.

I

FINDINGS OF FACT

Weiss Brothers Construction Company, Inc., dba Weisscal Company, is a general engineering contractor licensed by the State of California. Its officers are David Gene Weiss, President, and Mark Weiss, Secretary. (DAS 5).

On April 30, 1985 the City Council of San Jose, California awarded Weisscal a public works contract for construction of the Downtown San Jose Transit Mall Project (hereinafter "Project" or San Jose Transit Mall"). (DAS 28).

Weisscal and the City of San Jose executed the San Jose Transit Mall Project on June 3, 1985. (DAS 5). The contract amount is $29,302,570.00 and of 880 days duration, in excess of the jurisdictional requirements of Labor Code § 1777.5 (DAS 28; DAS 29).

The City of San Jose authorized Weisscal to begin work on the Project on June 24, 1985. (DAS 29).

The bid specifications for the Project provide that the contractor is to comply with Labor Code § 1777.5 (DAS 4). Similarly, the contract, in Article VIII, provides:

> "Contractor agrees to comply with all of the applicable provisions of Sections 1777.5 and 1777.6 of the Labor Code, which Sections are hereby specifically referred to, incorporated herein by reference and made a part hereof as though set forth at length herein." (DAS 5).

Work began on the San Jose Transit Mall Project on June 25, 1985. From that date on and throughout the duration of the Project, Weisscal employed workers in the apprenticeable craft of operating engineer. (DAS 27; Weiss E and Weiss D).

Weisscal requested a certificate of approval to train operating engineer apprentices on a DAS 7 form signed by Deborah E.G. Wilder, Esq. on behalf of Weisscal and dated June 27, 1985. The JAC requested a resubmittal of the form to correct a procedural matter, and Ms. Wilder signed the resubmittal on July 25, 1985.

The DAS 7 was given an effective date of approval of July 25, 1985. (Tr. Vol. V, pp. 147-175; DAS 6).

Sheila Chase, DAS Senior Apprenticeship Consultant for San Jose, informed Weisscal of its obligations under Labor Code § 1777.5 in a letter addressed to Weisscal's president dated September 17, 1985. (DAS 9).

On October 2, 1985, Sheila Chase and Robert Beall, JAC Apprenticeship Coordinator for San Jose, met with David Weiss, President of Weisscal, and his attorneys. The purpose of the meeting was to discuss Weisscal's obligations under Labor Code § 1777.5. (Tr. Vol. III, pp. 130-131).

JAC transmitted to Weisscal information concerning Weisscal's obligations to contribute to the training trust fund. The instructions transmitted by JAC provide that the contributions are due by the 15th of the month following the month when the work is performed and become delinquent if not received by the 25th of the month. The transmittal also specifies the applicable contribution rate. (Tr. Vol. V, pp. 175-177).

Weisscal made its first payment of trust fund contributions by a check in the amount of $539.96 and dated October 4, 1985. (DAS 13). The check was returned to Weisscal because it was calculated at the incorrect rate. (Tr. Vol. V, p. 178).

Sheila Chase met with David Weiss at Weiss' request on January 28, 1986. Weiss requested a meeting in order to get apprenticeship issues settled and find out what he needed to do. During the meeting, the requirements of Labor Code § 1777.5 were discussed. Weiss told Chase that he would contact Bob Beall and request referral of apprentices so he could come into compliance with the 1 to 5 ratio of apprentices to journeymen. (Tr. Vol. III, pp. 156-159) (DAS 19).

Mr. Weiss requested another meeting with Ms. Chase on February 7, 1986. Mr. Weiss wanted to bring the training fund payment to Ms. Chase's office. (Tr. Vol. III, pp. 160-161).

A meeting took place between Ms. Chase, Mr. Weiss, and a woman from Mr. Weiss' office on February 7, 1986. (Tr. Vol. III, p. 161).

At the meeting Mr. Weiss submitted payments for apprenticeship training for various crafts, including operating engineers. The payments were for hours worked from July 1, 1985 through December 31, 1985. (DAS 20). The check for operating engineer contributions was in the amount of $2,509.41.

Additional operating engineer training contributions were made as follows: June 26, 1987 payment of $1,806.05 from Weisscal to JAC Trust Fund and October 19, 1987 payment of $8,080.39 from Weisscal to JAC Trust Fund. These payments covered hours for the period from January 1, 1986 through June 30, 1987. (Tr. Vol. VI, p. 5).

An operating engineer apprentice, Richard Casey, was dispatched to Weisscal to perform work on the San Jose Transit Mall Project on March 17, 1988. (DAS 23). Mr. Casey was employed by Weisscal on the Project for a total of 18 days. (DAS 1; Tr. Vol. V, p. 184).

From July 15, 1985 through October 4, 1987, Weisscal employed 5 or more operating engineers on the project for a total of 408 days,[6] and employed 10 or more operating engineers for a total of 55 days. (Weiss D, Weiss E.)

II

CONCLUSIONS OF LAW

Labor Code section 1777.5 requires a public works contractor to:

1. Request a certificate of approval to train apprentices on the public works project from the approved JAC in the locale;

2. Contribute into the training trust fund administered by the JAC for each hour worked by journeymen in the craft or trade in the same manner and upon the same basis as other contractors are required to do; and

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[6]On some of the 385 days, Weisscal employed both a day and night shift. Nonetheless, on 345 of those days, there were 5 or more operating engineers employed on a single shift. (Weiss E).

3. Request dispatch of apprentices when the number of journeymen employed in the craft reaches the ratio specified in the applicable apprenticeship standards, but in no case less than 1 apprentice for each 5 journeymen employed.

Labor Code section 1777.7 mandates the imposition of specified penalties on contractors who willfully violate the provisions of Labor Code § 1777.5. Those penalties are:

1. A prohibition from bidding on any public works contract for a period of one year and,

2. A civil penalty of $50.00 per day for each calendar day of willful non-compliance.

The legal standard to be applied in determining whether a contractor's non-compliance with Labor Code § 1777.5 was willful is whether the contractor knew or should have known of the obligations of Labor Code § 1777.5 and failed or refused to comply, without adequate excuse or justification.[7] This is the same standard applicable to other sections of the Labor Code.

A. Application For Certificate of Approval to Train.

Although Labor Code section 1777.5 does not contain a specific time limit for the contractor to seek approval to train apprentices from the appropriate JAC(s), duly promulgated regulations do. Title 8, *Cal.Admin. Code* § 229(b) requires the contractor to make application immediately upon the award of the contract.

In this case, the contract was awarded on April 30, 1985 and executed on June 3, 1985. Work actually began on the project on June 25, 1985, and Weisscal applied for a certificate to train apprentices on June 27, 1985.

Although Ms. Chase testified that DAS policy is to allow contractors up until the time that work actually commences on a Project to request approval to train, the better practice is to strictly enforce the provisions of Title 8, Cal.Admin. Code

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[7] *Gail Jesswein, et al. v. Rail Roadway Constructions, Inc., et al.*, Case Nos. PW 214-85-7 (MF); PW 214-86-1 (8-25-86).

§ 229(b), since prompt application will facilitate the approval process and eventual dispatch of apprentices when the ratio is reached. As a practical matter, the contractor should request approval to train apprentices crafts upon execution of the contract.

Weisscal waited 24 days beyond execution of the contract to seek approval from JAC to train apprentices. The question becomes whether or not Weisscal's failure to seek approval upon executing the contract was willful.

Both the Project bid specifications and contract specifically direct the contractor's attention to the requirements of Labor Code § 1777.5. The contractor is presumed to have knowledge of the regulations which implement § 1777.5.

Weisscal's failure to comply with the express requirements of Title 8 Cal.Admin. Code § 229(b) was not willful because Weisscal sought approval to train apprentices within 3 days of the commencement of work on the Project, consistent with DAS policy.

B. Contribution To The Training Trust Fund.

Labor Code section 1777.5 requires contractors to contribute to the appropriate training trust fund for hours worked by workers in the craft in the same manner and upon the same basis as other contractors.

Weisscal was obligated to pay training trust fund contributions to JAC's trust fund by July 15, 1985 for operating engineer hours worked in June, and by the 15th of the month or thereafter. Weisscal did not make its first contribution until October 4, 1985. The payment was made at the incorrect rate of $.39 per hour instead of $.41 per hour. This payment was delinquent for the month of June, July, and August, 1985, and timely for the month of September, 1985, albeit at the incorrect rate.

Weisscal did not make another payment until February 7, 1986, and that payment covered hours worked by operating engineers from June, 1985 through December 31, 1985. This contribution was delinquent.

The next contributions made by Weisscal were made on June 26, 1987 and October 19, 1987. The June payment covered hours worked for March, April, and May.

A Stipulation was made that the October 19, 1987 payment covered hours worked up through June 30, 1987. Unquestionably, the October 19, 1987 payment was delinquent.

The Project bid specifications and contract put Weisscal on Notice of the contribution requirement set forth in Labor Code § 1777.5. Furthermore, JAC put Weisscal on notice of more detailed information concerning the contribution requirements, including the contribution rate, contribution due date and delinquency date, and the address where payment should be mailed. (OE HH).

Weisscal offered no evidence to justify or excuse its non-compliance with its contribution obligation.[8]

Accordingly, it is found that Weisscal willfully violated its obligation to make training contributions for the months of June, July, August, October, November, December, 1985; the entire calendar year of 1986; January, February, March, April, May, June, July, 1987.

C. Ratio Requirement.

Labor Code section 1777.5 requires the contractor to employ 1 apprentice for each 5 journeymen employed in the applicable craft or trade.

From July 16, 1985 on, and regularly from July 29, 1985 on, Weisscal employed 5 or more operating engineer journeymen. (Weiss D; Weiss E).

Weisscal did not request the dispatch of an apprentice until early March, 1986, when Richard Casey was dispatched to work

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[8]Apparently during the October 2, 1985 meeting between Weisscal, Sheila Chase, and Bob Beall, Weisscal raised the issue that contributions could be illegal because it was not a signatory to a collective bargaining agreement with operating engineers. This issue was resolved during the meeting.

on the Project. Apprentice Casey worked for a total of 18 days from March 17, 1986 to April 11, 1986. (Weiss D).

Weisscal was informed of the requirements of Labor Code § 1777.5 initially in the bid specifications and the contract. Weisscal received further and more specific information on the three requirements of § 1777.5 in the July 12, 1985 letter from JAC. (OE HH).

The specific requirements the section were also explained to Weisscal by DAS consultant Sheila Chase in a letter dated September 17, 1985 (DAS 8). On October 2, 1985 Ms. Chase and JAC coordinator, Bob Beall, met with Weisscal and its attorney. At the meeting, Ms. Chase discussed the 1 to 5 ratio requirement. (Tr. Vol. III, pp. 131-132). The dispatch of apprentices and ratio requirement was the subject of the January 28, 1986 meeting between Ms. Chase and David Weiss. (Tr. Vol. III, pp. 157-162).

The only evidence offered by Weisscal with respect to the issue of ratio compliance is that for portions of the Project, it ran both a day and night shift. (Weiss E). If each shift is looked at separately, Weisscal would not have met the ratio until August 5, 1985. After August 5, 1985, there are additional days where the ratio is only met by combining the two shifts (e.g., 10-15-85 and 10-16-85: Weiss E).

This evidence does not excuse Weisscal from compliance with the ratio aspect of Labor Code § 1777.5. Instead, its import is to attempt to limit the number of days of non-compliance.

Labor Code § 1777.5 does not speak in terms of work shifts. Rather, it looks at the number of workers employed on a daily basis. Thus, I conclude that the ratio requirement is to be calculated by reference to the actual number of employees employed per day on the Project as reflected in the certified payroll records.

Weisscal willfully violated the ratio requirements set forth in Labor Code § 1777.5. Those violations began on July 16, 1985 and continued throughout the Project until October 4, 1987. (Weiss E and DAS 27).

No ratio violation occurred duting the period of March 17, 1986 through April 11, 1986 when apprentice Richard Casey was dispatched to the Project.

III

PENALTY

Labor code § 1777.7 requires the imposition of penalties against contractors who willfully violate the provisions of Labor Code § 1777.5 as follows:

> "In the event a contractor willfully fails to comply with the provisions of Section 1777.5, such contractor shall:
>
> (1) Be denied the right to bid on any public works contract for a period of one year from the date the determination is made . . . and
>
> (2) Forfeit as a civil penalty in the sum of fifty dollars ($50) for each calendar day of non-compliance."

Weisscal willfully violated the provisions of Labor Code § 1777.5 on the San Jose Transit Mall Project in that it:

1. Failed to make timely contributions to the apprentice training trust fund for all but small portions of the Project, and

2. Failed to employ the mandated ratio of apprentices to journeymen in the craft of operating engineer for the entire project, with the exception of a 3-week period when apprentice Casey was employed.

A. Calculation Of The Penalty.

Labor Code section 1777.7 clearly states that the $50.00 per day of violation penalty is to be calculated on a calendar basis. Multiple daily penalties (i.e., for 2 or more violations occurring on a single day) are not provided for.

Because the Project was ongoing at the conclusion of this hearing, and because the evidence demonstrates violations beyond July 25, 1987 in both ratio (DAS 27) and training contributions,

only an interim penalty can be calculated and jurisdiction is retained for final calculation when the Project is complete.

The interim penalty of $50.00 per calendar day begins to run from July 25, 1985 when Weisscal first employed workers in apprenticeable craft of operating engineer, and continues to run monthly thereafter until at least October 4, 1987, with the exception of certain days in September 1985 when contributions were found to be timely.

Relying on DAS 37 (with the exception of penalties for application), DAS 27 and Weiss E, there are 781 calendar days of violations from June 25, 1985 through October 4, 1987. The interim penalty is $39,000.00.

Jurisdiction is retained to calculate any additional violations throughout the remainder of the Project.

B. Debarment.

The willful violations found with respect to ratio and contribution requirements also mandate imposition of the penalty of debarment.

C. Liability Of David Gene Weiss And Alan Mark Weiss.

DAS seeks the imposition of penalties against Weisscal and its corporate officers, David Gene Weiss and Alan Mark Weiss.

I conclude that applicable law mandates imposition of the penalties against not only Weisscal, but also its officers and licensee.

Labor Code § 1777.7 requires imposition of penalties:

> . . . [i]n the event a *contractor* willfully fails to comply with the provisions of Section 1777.5 *such contractor* . . ." (Emphasis added.)

Labor Code § 17722.1 defines the term "contractor" as it is used in section 1777.7. The definition of contractor is:

> "for the purposes of this chapter, 'contractor' and 'subcontractor' includes a contractor, subcontractor, licensee, officer, agent, or representative thereof, acting in that capacity, when

working on public works pursuant to this article and Article 2 (commencing with Section 1770).

That definition *specifically* applies to Section 1777.7. It is broad and includes by its clear language, the contractor and its officers, agents, licensee and/or representatives. David Gene Weiss and Alan Mark Weiss are Weisscal's officers and representatives, and acted in that capacity with respect to the San Jose Transit Mall Project. Accordingly, the penalties of debarment and $50.00 calendar day of violation assessment apply to Weisscal and to David Gene Weiss and Alan Mark Weiss.

CONCLUSION

Weisscal and its officers, David Gene Weiss and Alan Mark Weiss, willfully violated Labor Code § 1777.5 by:

1. Failing to make timely contributions to the training trust fund for hours worked by operating engineers from June 25, 1985 through July 31, 1987 with the exception of September, 1985.

2. Failing to employ the mandatory ratio of apprentices to journeymen on numerous days throughout the Project, beginning as early as July 16, 1985 and continuing thereafter through October 4, 1987, with the exception of March 17, 1986 to April 11, 1986.

ORDER

Weiss Brothers Construction Company, Inc., dba Weisscal Company; Alan Mark and David Gene Weiss shall:

1. Be denied the right to seek, by bid or any other means of contract negotiation or procedure equivalent to a bid, any public works contract, for a period of one year from the effective date of this Determination as specified in Labor Code section 3082.

2. Forfeit as a civil penalty the sum of $50.00 per day to the general fund of the City of San Jose, throught the Division of Labor Standards Enforcement, pursuant to this Determination.

3. The Division of Apprenticeship Standards will notify the appropriate state and local awarding bodies to assure that compliance with this Determination is enforced.

The Administrator of Apprenticeship expressly retains jurisdiction over this matter for purposes of calculating additional penalties as further evidence becomes available.

DATED: 4-14-88

RON RINALDI
Administrator of Apprenticeship

APPENDIX G

Employee Retirement Income Security Act,
Sections 514(a) and 514(d),
29 U.S.C. §§ 1144(a) and 1144(d)

Section 514. Other Laws

(a) **Supersedure; Effective date**

Except as provided in subsection (b) of this section, the provisions of this title and title IV shall supersede any and all state laws insofar as they may nor or hereafter relate to any employee benefit plan described in section 4(a) and not exempt under section 4(b)....

(d) **Alteration, amendment, modification, invalidation, impairment, or supersedure of any law of United States prohibited**

Nothing in this title shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in sections 111 and 507(b)) or any rule or regulation issued under any such law.

APPENDIX H

National Apprenticeship Act (Fitzgerald Act),
Section 1,
29 U.S.C. § 50

Section 50. **Promotion of labor standards of apprenticeship**

The Secretary of Labor is authorized and directed to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. . . .

APPENDIX I

29 C.F.R.
PART 29—LABOR STANDARDS FOR THE REGISTRATION OF APPRENTICESHIP PROGRAMS

Sec.

29.1 Purpose and scope.
29.2 Definitions.
29.3 Eligibility and procedure for Bureau registration of a program.
29.4 Criteria for apprenticeable occupations.
29.5 Standards of apprenticeship.
29.6 Apprenticeship agreement.
29.7 Deregistration of Bureau-registered program.
29.8 Reinstatement of program registration.
29.9 Hearings.
29.10 Limitations.
29.11 Complaints.
29.12 Recognition of State agencies.
29.13 Derecognition of State agencies.

AUTHORITY: Sec. 1, 50 Stat. 664, as amended (29 U.S.C. 50; 40 U.S.C. 276c; 5 U.S.C. 301); Reorganization Plan No. 14 of 1950, 64 Stat. 1267 (5 U.S.C. App., p. 534).

SOURCE: 42 FR 10139, Feb. 18, 1977, unless otherwise noted.

§ 29.1 Purpose and scope.

(a) The National Apprenticeship Act of 1937, section 1 (29 U.S.C. 50), authorizes and directs the Secretary of Labor "to formulate and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare." Section 2 of the Act authorizes the Secretary of Labor to "publish information relating to existing and proposed labor standards of apprenticeship," and to "appoint national advisory committees." (29 U.S.C. 50a).

(b) The purpose of this part is to set forth labor standards to safeguard the welfare of apprentices, and to extend the application of such standards by prescribing policies and procedures

concerning the registration, for certain Federal purposes, or acceptable apprenticeship programs with the U.S. Department of Labor, Employment and Training Administration, Bureau of Apprenticeship and Training. These labor standards, policies and procedures cover the registration, cancellation and deregistration or apprenticeship programs and of apprenticeship agreements; the recognition of a State agency as the appropriate agency for registering local apprenticeship programs for certain Federal purposes; and matters relating thereto.

(c) For further information about this Part 29, contact: Deputy Administrator, Bureau of Apprenticeship and Training, Employment and Training Administration, Room 5000, Patrick Henry Building, Washington, D.C. 20213, Telephone number (202) 376-6585.

§ 29.2 Definitions.

As used in this part:

(a) "Department" shall mean the U.S. Department of Labor.

(b) "Secretary" shall mean the Secretary of Labor or any person specifically designated by him.

(c) "Bureau" shall mean the Bureau of Apprenticeship and Training, Employment and Training Administration.

(d) "Administrator" shall mean the Administrator of the Bureau of Apprenticeship and Training, or any person specifically designated by him.

(e) "Apprentice" shall mean a worker at least 16 years of age, except where a higher minimum age standard is otherwise fixed by law, who is employed to learn a skilled trade as defined in § 29.4 under standards of apprenticeship fulfilling the requirements of § 29.5

(f) "Apprenticeship Program" shall mean a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices, including such matters as the requirement for a written apprenticeship agreement.

(g) "Sponsor" shall mean any person, association, committee, or organization operating an apprenticeship program and in whose name the program is (or is to be) registered or approved.

(h) "Employer" shall mean any person or organization employing an apprentice whether or not such person or organization is a party to an apprenticeship agreement with the apprentice.

(i) "Apprenticeship Committee" shall mean those persons designated by the sponsor to act for it in the administration of the program. A committee may be "joint," i.e., it is composed of an equal number of representatives of the employer(s) and of the employees represented by a bona fide collective bargaining agent(s) and has been established to conduct, operate, or administer an apprenticeship program and enter into apprenticeship agreements with apprentices. A committee may be "unilateral" or "non-joint" and shall mean a program sponsor in which a bona fide collective bargaining agent is not a participant.

(j) "Apprenticeship agreement" shall mean a written agreement between an apprentice and either his employer, or an apprenticeship committee acting as agent for employer(s), which agreement contains the terms and conditons of the employment and training of the apprentice.

(k) "Federal purposes" includes any Federal contract, grant, agreement or arrangement dealing with apprenticeship; and any Federal financial or other assistance, benefit, privilege, contribution, allowance, exemption, preference or right pertaining to apprenticeship.

(l) "Registration of an apprenticeship program" shall mean the acceptance and recording of such program by the Bureau of Apprenticeship and Training, or registration and/or approval by a recognized State Apprenticeship Agency, as meeting the basic standards and requirements of the Department for approval of such program for Federal purposes. Approval is evidenced by a Certificate of Registration or other written indicia.

(m) "Registration of an apprenticeship agreement shall mean the acceptance and recording thereof by the Bureau or a recognized State Apprenticeship Agency as evidenced of the participa-

tion of the apprentice in a particular registered apprenticeship program.

(n) "Certification" shall mean written approval by the Bureau of:

(1) A set of apprenticeship standards developed by a national committee or organization, joint or unilateral, for policy or guideline use by local affiliates, as substantially conforming to the standards of apprenticeship programs.

(2) An individual as eligible for probationary employment as an apprentice under a registered apprenticeship program.

(o) "Recognized State Apprenticeship Agency" or "recognized State Apprenticeship Council" shall mean an organization approved by the Bureau as an agency or council which has been properly constitued under an acceptable law or Executive order, and has been approved by the Bureau as the appropriate body for state registration and/or approval of local apprenticeship programs and agreements for Federal purposes.

(p) "State" shall mean any of the 50 States or the United States, the District of Columbia, of any territory or possession of the United States.

(q) "Related instruction"' shall mean an organized and systematic form of insturction designed to provide the apprenticeship with knowledge of the theoretical and technical subjects related to his/her trade.

(s) "Registration agency" shall mean the Bureau or a recognized State Apprenticeship Agency.

§ 29.3 Eligibility and procedure for Bureau Registration of a program.

(a) Eligiblity for various Federal purposes is conditioned upon a program's conformity with apprenticeship program standards published by the Secretary of Labor in this part. For a program to be determined by the Secretary of Labor as being in conformity with these published standards the program must be registered with the Bureau or registered with and/or approved by a State

Apprenticeship Agency or Council recognized by the Bureau. Such determination by the Secretary is made only by such registration.

(b) No apprenticeship program or agreement shall be eligible for Bureau registration unless (1) it is in conformity with the requirements of this part and the training is in an apprenticeable occupation having the characteristics set forth in § 29.4 herein, and (2) it is in conformity with the requirements of the Department's regulation on "Equal Employment Opportunity in Apprenticeship and Training" set forth in 29 CFR Part 30, as amended.

(c) Except as provided under paragraph (d) of the section, apprentices must be individually registered under a registered program. Such registration may be effected:

(1) By filing copies of each apprenticeship agreement; or

(2) Subject to proper Bureau approval, by filing a master copy of such agreement followed by a listing of the name, and other required data, of each individual.

(d) The names of persons in their first 90 days of probationary employment as an apprentice under an apprenticeship program registered by the Bureau or a recognized State Apprenticeship Agency, if not individually registered under such program, shall be submitted immediately after employment to the Bureau or State Apprenticeship Agency for certification to establish the apprentice as eligible for such probationary employment.

(e) The appropriate registration office must be promptly notified of the cancellation, suspension, or termination of any apprenticeship agreement, with cause for same, and of apprenticeship completions.

(f) Operating apprenticeship programs when approved by the Bureau shall be accorded registration evidenced by a Certificate of Registration. Programs approved by recognized State Apprenticeship Agencies shall be accorded registrations and/or approval evidenced by a similar certificate or other written indicia. When approved by the Bureau, national apprenticeship standards for

policy or guide lines shall be accorded certification, evidenced by a certificate attesting to the Bureau's approval.

(g) Any modification(s) or change(s) to registered or certified programs shall be promptly submitted to the registration office and, if approved, shall be recorded and acknowledged as an amendment to such program.

(h) Under a program proposed for registration by an employer or employer's association, where the standards, collective bargaining agreement or other instrument, provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The registration agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(i) Where the employees to be trained have no collective bargaining agent, an apprenticeship program may be proposed for registration by an employer or group of employers.

(Approved by the Office of Management and Budget under OMB control number 1205-0223)

[42 FR 10139, Feb. 18, 1977; 42 FR 30836, June 17, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.4 Criteria for apprenticeable occupations.

An apprenticeable occupation is a skilled trade which possesses all of the following characteristics:

(a) It is customarily learned in a practical way through a structured, systematic program of on-the-job supervised training.

(b) It is clearly identified and commonly recognized throughout an industry.

(c) It involves manual, mechanical or technical skills and knowledge which require a minimum of 2,000 hours of on-the-job experience.

(d) It requires related instruction to supplement the on-the-job trainng.

§ 29.5 Standards of apprenticeship.

An apprenticeship program, to be eligible for registration/approval by a registration/approval agency, shall conform to the following standards:

(a) The program is an orgainized, written plan embodying the terms and conditions of employment, training, and supervision of one or more apprentices in the apprenticeable occupation, as defined in this part, and subscribed to by a sponsor who has undertaken to carry out the apprentice training program.

(b) The program standards contain the equal opportunity pledge prescribed in 29 CRF 30.3(b) and, when applicable, an affirmative action plan in accordance with 29 CFR 30.4, a selection method authorized in 29 CFR 30.5, or similar requirements expressed in a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department, and provisions concerning the following:

(1) The employment and training of the apprentice in a skilled trade;

(2) A term of apprenticeship, not less than 2,000 hours of work experience, consistent with training requirements as established by industry practice;

(3) An outline of the work processes in which the apprentice will receive supervised work experience and training on the job, and the allocation of the approximate time to be spent in each major process;

(4) Provision for organized, related and supplemental instruction in technical subjects related to the trade. A minimum of 144 hours for each year or apprenticeship is recommended. Such instruction may be given in a classroom through trade or indus-

trial courses, or by correspondence courses of equivalent value, or other forms of self-study approved by the registration/approval agency.

(5) a progressively increasing schedule of wages to be paid the apprentice consistent with the skill acquired. The entry wage shall be not less than the minimum wage prescribed by the Fair Labor Standards Act, where applicable, unless a higher wage is required by other applicable Federal law, State law, respective regulations, or by collective bargaining agreement;

(6) Periodic review and evaluation of the apprentice's progress in job performance and related instruction; and the maintenance of appropriate progress records;

(7) The numeric ratio of apprentices to journeymen consistent with proper supervision, training, safety, and continuity of employment, and applicable provisions in collective bargaining agreements, except where such ratios are expressly prohibited by the collective bargaining agreements. The ratio language shall be specific and clear as to application in terms of jobsite, work force, department or plant;

(8) A probationary period reasonable in relation to the full apprenticeship term, with full credit given for such period toward completion of apprenticeship;

(9) Adequate and safe equipment and facilities for training and supervision, and safety training for apprentices on the job and in related instruction;

(10) The minimum qualifications required by a sponsor for persons entering the apprenticeship program, with an eligible starting age not less than 16 years.

(11) The placement of an apprentice under a written apprenticeship agreement as required by the State apprenticeship law and regulation, or the Bureau where no such State law or regulation exits. The agreement shall directly, or by reference, incorporate the standards of the program as part of the agreement;

(12) The granting of advanced standing or credit for previously acquired experience, training, or skills for all applicants equally, with commensurate wages for any progression step so granted;

(13) Transfer of employer's training obligation when the employer is unable to fulfill his obligation under the apprenticeship agreement to another employer under the same program with consent of the apprentice and apprenticeship committee or program sponsor;

(14) Assurance of qualified training personnel and adequate supervision on the job;

(15) Recognition for successful completion of apprenticeship evidenced by an appropriate certificate;

(16) Identification of the registration agency;

(17) Provision for the registration, cancellation and deregistration of the program; and requirement for the prompt submission of any modification or amendment thereto;

(18) Provision for registration of apprenticeship agreements, modifications, and amendments; notice to the registration office of persons who have successfully completed apprenticeship programs; and notice of cancellations, suspensions and terminations of apprenticeship agreements and causes therefor.

(19) Authority for the termination of an apprenticeship agreement during the probationary period by either party without stated cause:

(20) A statement that the program will be conducted, operated and administered in conformity with applicable provisions of 29 CFR Part 30, as amended, or a State EEO in apprenticeship plan adopted pursuant to 29 CFR Part 30 and approved by the Department;

(21) Name and address of the appropriate authority under the program to receive, process and make disposition of complaints;

(22) Recording and maintenance of all records concerning apprenticeship as may be required by the Bureau or recognized State Apprenticeship Agency and other applicable law.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977; 42 FR 30836, June 17, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.6 Apprenticeship agreement

The apprenticeship agreement shall contain explicitly or by reference:

(a) Names and signatures of the contracting parties (apprentice, and the program sponsor or employer), and the signature of a parent or guardian if the apprentice is a minor.

(b) The date of birth of apprentice.

(c) Name and address of the program sponsor and registration agency.

(d) A statement of the trade or craft in which the apprentice is to be trained, and the beginning date and term (duration) of apprenticeship.

(e) A statement showing (1) the number of hours to be spent by the apprentice in work on the job, and (2) the number of hours to be spent in related and supplemental instruction which is recommended to be not less than 144 hours per year.

(f) A statement setting forth a schedule of the work processes in the trade or industry divisions in which the apprentice is to be trained and the approximate time to be spent at each process.

(g) A statement of the graduated scale of wages to be paid the apprentice and whether or not the required school time shall be compensated.

(h) Statement providing:

(1) For a specific period of probation during which the apprenticeship agreement may be terminated by either party to the agreement upon written notice to the registration agency;

(2) That, after the probationary period, the agreement may be cancelled at the request of the apprentice, or may be suspended, cancelled, or terminated by the sponsor, for good cause, with due

notice to the apprentice and a reasonable opportunity for corrective action, and with written notice to the apprentice and to the registration agency of the final action taken.

(i) A reference incorporating as part of the agreement the standards of the apprenticeship program as it exists on the date of the agreement and as it may be amended during the period of the agreement.

(j) A statement that the apprentice will be accorded equal opportunity in all phases of apprenticeship employment and training, without discrimination because of race, color, religion, national origin, or sex.

(k) Name and address of the appropriate authority, if any, designated under the program to receive, process and make disposition of controversies or differences arising out of the apprenticeship agreement when the controversies or differences cannot be adjusted locally or resolved in accordance with the established trade procedure or applicable collective barganing provisions.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.7 Deregistration of Bureau-registered program.

Deregistration of a program may be effected upon the voluntary action of the sponsor by a request for cancellation of the registration, or upon reasonable cause, by the Bureau instituting formal deregistration proceedings in acordance with the provisions of that part.

(a) *Request by sponsor.* The registration officier may cancel the registration of an apprenticeship program by written acknowledgment of such request stating, but not limiting to, the following matters:

(1) The registration is cancelled at sponsor's request and effective date thereof;

(2) That, within 15 days of the date of the acknowledgment, the sponsor shall notify all apprentices of such cancellation and the effective date; that such cancellation automatically deprives the apprentice of his/her individual registration; and that the deregistration of the program removes the apprentice from coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program.

(b) *Formal deregistration*—(1) *Reasonable cause.* Deregistration proceedings may be undertaken when the apprenticeship program is not conducted, operated, and administered in accordance with the registered provisions or the requirements of this part, except that deregistration proceedings for violation of equal opportunity requirements shall be processed in accordance with the provisions under 29 CFR Part 30, as amended;

(2) Where it appears the program is not being operated in accordance with the registered standards or with requirements of this part, the registration officer shall so notify the program sponsor in writing;

(3) The notice shall (i) be sent by registered or certified mail, with return receipt requested; (ii) state the shortcoming(s) and the remedy required; and (iii) state that a determination of reasonable cause for deregistration will be made unless corrective action is effected within 30 days;

(4) Upon request by the sponsor for good cause, the 30-day term may be extended for another 30 days. During the period for correction, the sponsor shall be assisted in every reasonable way to achieve conformity;

(5) If the required correction is not effected within the allotted time, the registration officer shall send a notice to the sponsor, by registered or certified mail, return receipt requested, stating the following:

(i) The notice is sent pursuant to this subscription;

(ii) Certain deficiencies (stating them) were called to sponsor's attention and remedial measures requested, with dates of such occasions and letters; and that the sponsor has failed or refused to effect correction;

(iii) Based upon the stated deficiencies and failure of remedy, a determination of reasonable cause has been made and the program may be deregistered unless, within 15 days of the receipt of this notice, the sponsor requests a hearing;

(iv) If a request for a hearing is not made, the entire matter will be submitted to the Administrator, BAT, for a decision on the record with respect to deregistration.

(6) If the sponsor has not requested a hearing, the registration officer shall transmit to the Administrator, BAT, a report containing all pertinent facts and circumstances concerning the nonconformity, including the findings and recommendation for deregistration, and copies of all relevant documents and records. Statements concerning interviews, meetings and conferences shall include the time, date, place, and persons present. The Administrator shall make a final order on the basis of the record before him.

(7) If the sponsor requests a hearing, the registration officer shall transmit to the Secretary, through the Administrator, a report containing all the data listed in paragraph (b)(6) of this section. The Secretary shall convene a hearing in accordance with § 29.9; and shall make a final decision on the basis of the record before him including the proposed findings and recommended decision of the hearing officer.

(8) At his discretion, the Secretary may allow the sponsor a reasonable time to achieve voluntary corrective action. If the Secretary's decision is that the apprenticeship program is not operating in accordance with the registered provisions or requirements of this part, the apprenticeship program shall be deregistered. In each case in which reregistration is ordered, the Secretary shall make public notice of the order and shall notify the sponsor.

(9) Every order of deregistration shall contain a provision that the sponsor shall, within 15 days of the effective date of the order, notify all registered apprentices of the deregistration of the program; the effective date thereof; that such cancellation automatically deprives the apprentice or his/her individual registration; and that the deregistration removes the apprentice from

coverage for Federal purposes which require the Secretary of Labor's approval of an apprenticeship program.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10319, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.8 Reinstatement of program registration.

Any apprenticeship program deregistered pursuant to this part may be reinstated upon presentation of adequate evidence that the apprenticeship program is operating in accordance with this part. Such evidence shall be presented to the Administrator, BAT, if the sponsor had not requested a hearing, or to the Secretary, if an order of deregistration was entered pursuant to a hearing.

§ 29.8 Hearings.

(a) Within 10 days of his receipt of a request for a hearing, the Secretary shall designate a hearing officer. The hearing officer shall give reasonable notice of such hearing by registered mail, return receipt requested, to the appropriate sponsor. Such notice shall include (1) a reasonable time and place of hearing, (2) a statement of the provisions of this part pursuant to which the hearing is to be held, and (3) a concise statement of the matters pursuant to which the action forming the basis of the hearing is proposed to be taken.

(b) the hearing officer shall regulate the course of the hearing. Hearings shall be informally conducted. Every party shall have the right to counsel, and a fair opportunity to present his/her case, including such cross-examination as may be appropriate in the circumstances. hearings officers shall make their proposed findings and recommended decisions to the Secretary upon the basis of the record before them.

§ 29.10 Limitations.

Nothing in this part or in any apprenticeship agreement shall operate to invalidate:

(a) Any apprenticeship provision in any collective bargaining agreement between employers and employees establishing higher apprenticeship standards; or

(b) Any special provision for veterans, minority persons or females in the standards, apprentice qualifications or operation of the program, or in the apprenticeship agreement, which is not otherwise prohibited by law, Executive order, or authorized regulation.

§ 29.11 Complaints.

(a) This section is not applicable to any complaint concerning discrimination or other equal opportunity matters; all such complaints shall be submitted, processed and resolved in accordance with applicable provisions in 29 CFR Part 30, as amended, or applicable provisions of a State Plan for Equal Employment Opportunity in Apprenticeship adopted pursuant to 29 CFR Part 30 and approved by the Department.

(b) Except for matters described in paragraph (a) of this section, any controversy or difference arising under an apprenticeship agreement which cannot be adjusted locally and which is not covered by a collective bargaining agreement, may be submitted by an apprentice, or his/her authorized representative, to the appropriate registration authority, either Federal or State, which has registered and/or approved the program in which the apprentice is enrolled, for review. Matters covered by a collective bargaining agreement are not subject to such review.

(c) The complaint, in writing and signed by the complainant, or authorized representative, shall be submitted within 60 days of the final local decision. It shall set forth the specific matter(s) complained of, together with all relevant facts and circumstances. Copies of all pertinent documents and correspondence shall accompany the complaint.

(d) The Bureau or recognized State Apprenticeship Agency, as appropriate, shall render an opinion within 90 days after receipt of the complaint, based upon such investigation of the matters submitted as may be found necessary, and the record before it. During the 90-day period, the Bureau or State agency shall make

reasonable efforts to effect a satisfactory resolution between the parties involved. If so resolved, the parties shall be notified that the case is closed. Where an opinion is rendered, copies of same shall be sent to all interested parties.

(e) Nothing in this section shall be construed to require an apprentice to use the review procedure set forth in this section.

(f) A State Apprenticeship Agency may adopt a complaint review procedure differing in detail from that given in this section provided it is proposed and has been approved in the recognition of the State Apprenticeship Agency accorded by the Bureau.

§ 29.12 Recognition of State agencies.

(a) The Secretary's recognition of a State Apprenticeship Agency or Council (SAC) gives the SAC the authority to determine whether an apprenticeship program conforms with the Sectretary's published standards and the program is, therefore, eligible for those Federal purposes which require such a determination by the Secretary. Such recognition of a SAC shall be accorded by the Secretary upon submission and approval of the following:

(1) An acceptable State apprenticeship law (or Executive order), and regulations adopted pursuant thereto;

(2) Acceptable composition of the State Apprenticeship Council (SAC);

(3) An acceptable State Plan for Equal Employment Opportunity in Apprenticeship;

(4) A description of the basic standards, criteria, and requirements for program registration and/or approval; and

(5) A description of policies and operating procedures which depart from or impose requirements in addition to those prescribed in this part.

(b) *Basic requirements.* Generally the basic requirements under the matters covered in paragraph (a) of this section shall be in conformity with applicable requirements as set forth in this part. Acceptable State provisions shall:

(1) Establish the apprenticeship agency in (i) the State Department of Labor, or (ii) in that agency of State government having jurisdiction of laws and regulations governing wages, hours, and working conditions, or (iii) that State agency presently recognized by the Bureau, with a State official empowered to direct the apprenticeship operation;

(2) Require that the State Apprenticeship Council be composed of persons familiar with apprenticeable occupations and an equal number of representatives of employer and of employee organizations and may include public members who shall not number in excess of the number named to represent either employer or employee organizations. Each representative so named shall have one vote. Ex officio members may be added to the council but they shall have no vote except where such members have a vote according to the established practice of a presently recognized council. If the State official who directs the apprenticeship operation is a member of the council, provision may be made for the official to have a tie-breaking vote;

(3) Clearly delineate the respective powers and duties of the State official and of the council;

(4) Clearly designate the officer or body authorized to register and deregister apprenticeship programs and agreements;

(5) Establish policies and procedures to promote equality of opportunity in apprenticeship programs pursuant to a State Plan for Equal Employment Opportunity in Apprenticeship which adopts and implements the requirements of 29 CFR Part 30, as amended, and to require apprenticeship programs to operate in conformity with such State Plan and 29 CFR Part 30, as amended;

(6) Prescribe the contents of apprenticeship agreements;

(7) Limit the registration of apprenticeship programs to those providing training in "apprenticeable" occupations as defined in § 29.4;

(8) Provide that apprenticeship programs and standards of employers and unions in other than the building and construction industry, which jointly form a sponsoring entity on a multistate

basis and are registered pursuant to all requirements of this part by any recognized State Apprenticeship Agency/Council or by the Bureau, shall be accorded registration or approval reciprocity by any other State Apprenticeshiip Agency/Council or office of the Bureau if such reciprocity is requested by the sponsoring entity;

(9) Provide for the cancellation, deregistration and/or termination of approval of programs, and for temporary suspension, cancellation, deregistration and/or termination of approval of apprenticeship agreements; and

(10) Provide that under a program proposed for registration by an employer or employers' association, and where the standards, collective bargaining agreement or other instrument provides for participation by a union in any manner in the operation of the substantive matters of the apprenticeship program, and such participation is exercised, written acknowledgement of union agreement or "no objection" to the registration is required. Where no such participation is evidenced and practiced, the employer or employers' association shall simultaneously furnish to the union, if any, which is the collective bargaining agent of the employees to be trained, a copy of its application for registration and of the apprenticeship program. The State agency shall provide a reasonable time period of not less than 30 days nor more than 60 days for receipt of union comments, if any, before final action on the application for registration and/or approval.

(c) *Application for recognition.* A State Apprenticeship Agency/Counil desiring recognition shall submit to the Administrator, BAT, the documentation specified in § 29.12(a) of this part. A currently recognized Agency/Council desiring continued recognition by the Bureau shall submit to the Administrator the deocumentation specified in § 29.12(a) of this part on or before July 18, 1977. An extension of time within which to comply with the requirements of this part may be granted by the Administrator for good cause upon written request by the State agency but the Administrator shall not extend the time for submission of the documentation required by § 29.12(a). The recognition of currently recognized Agencies/Councils shall continue until July 18,

1977 and during any extension period granted by the Administrator.

(d) *Appeal from denial of recognition.* The denial by the Administrator of a State agency's application for recognition under this part shall be in writing and shall set forth the reasons for the denial. The notice of denial shall be sent to the applicant by certified mail, return receipt requested. The applicant may appeal such a denial to the Secretary by mailing or otherwise furnishing to the Administrator, within 30 days of receipt of the denial, a notice of appeal addressed to the Secretary and setting forth the following items:

(1) A statement that the applicant appeals to the Secretary to reverse the Administrator's decision to deny its application;

(2) The date of the Administrator's decision and the date the applicant received the decision;

(3) A summary of the reasons why the applicant believes that the Administrator's decision was incorrect;

(4) A copy of the application for recognition and subsequent modifications, if any;

(5) A copy of the Administrator's decision of denial. Within 10 days of receipt of a notice of appeal, the Secretary shall assign an Administrative Law Judge to conduct hearings and to recommend findings of fact and conclusions of law. The proceedings shall be informal, witnesses shall be sworn, and the parties shall have the right to counsel and of cross-examination.

The Administrative Law Judge shall submit the recommendations and conclusions, together with the entire record to the Secretary for final decision. The Secretary shall make his final decision in writing within 30 days of the Administrative Law Judge's submission. The Secretary may make a decision granting recognition conditional upon the performance of one or more actions by the applicant. In the event of such a conditional decision, recognition shall not be effective until the applicant has submitted to the Secretary evidence that the required actions have been performed and the Secretary has communicated to the

applicant in writing that he is satisfied with the evidence submitted.

(e) *State apprenticeship programs.* (1) An apprenticeship program submitted for registration with a State Apprenticeship Agency recognized by the Bureau shall, for Federal purposes, be in conformity with the State apprenticeship law, regulations, and with the State Plan for Equal Employment Opportunity in Apprenticeship as submitted to and approved by the Bureau pursuant to 29 CFR 30.15, as amended;

(2) In the event that a State Apprenticeship Agency is not recognized by the Bureau for Federal purposes, or that such recognition has been withdrawn, or if no State Apprenticeship Agency exists, registration with the Bureau may be requested. Such registration shall be granted if the program is conducted, administered and operated in accordance with the requirements of this part and the equal opportunity regulation in 29 CFR Part 30, as amended.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10319, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

§ 29.13 Derecognition of State agencies.

The recognition for Federal purposes of a State Apprenticeship Agency or State Apprenticeship Council (hereinafter designated "respondent"), may be withdrawn for the failure to fulfill, or operate in conformity with, the requirements of this part. Derecognition proceedings for reasonable cause shall be instituted in accordance with the following:

(a) Derecognition proceedings for failure to adopt or properly enforce a State Plan for Equal Employment Opportunity in Apprenticeship shall be processed in accordance with the procedures prescribed in 29 CFR 30.15.

(b) For causes other than those under paragraph (a) above, the Bureau shall notify the respondent and appropriate State

sponsors in writing, by certified mail, with return receipt requested. The notice shall set forth the following:

(1) That reasonable cause exists to believe that the respondent has failed to fulfill or operate in conformity with the requirements of this part;

(2) The specific areas of nonconformity;

(3) The needed remedial measures; and

(4) That the Bureau proposes to withdraw recognition for Federal purposes unless corrective action is taken, or a hearing request mailed, within 30 days of the receipt of the notice.

(c) If, within the 30-day period, respondent:

(1) Complies with the requirements, the Bureau shall so notify the respondent and State sponsors, and the case shall be closed;

(2) Fails to comply or to request a hearing, the Bureau shall decide whether recognition should be withdrawn. If the decision is in the affirmative, the Administrator shall forward all pertinent data to the Secretary, together with the findings and recommendation. The Secretary shall make the final decision, based upon the record before him.

(3) Requests a hearing, the Administrator shall forward the request to the Secretary, and the procedures under § 29.9 shall be followed, with notice thereof to the State apprenticeship sponsors.

(d) If the Secretary determines to withdraw recognition for Federal purposes, he shall notify the respondent and the State sponsors of such withdrawal and effect public notice of such withdrawal. The notice to the sponsors shall state that, 30 days after the date of the Secretary's order withdrawing recognition of the State agency, the Department shall cease to recognize, for Federal purposes, each apprenticeship program registered with the State agency unless, within that time, the State sponsor requests registration with the Bureau. The Bureau may grant the request for registration contingent upon its finding that the State apprenticeship program is operating in accordance with the requirements of this part and of 29 CFR Part 30, as amended. The Bureau shall make a finding on this issue within 30 days of receipt

of the request. If the finding is in the negative, the State sponsor shall be notified in writing that the contingent Bureau registration has been revoked. If the finding is in the affirmative, the State sponsor shall be notified in writing that the contingent Bureau registration is made permanent.

(e) If the sponsor fails to request Bureau registration, or upon a finding of noncompliance pursuant to a contingent Bureau registration, the written notice to such State sponsor shall further advise the recipient that any actions or benefits applicable to recognition "for Federal purposes" are no longer available to participants in its apprenticeship program.

(f) Such notice shall also direct the State sponsor to notify, within 15 days, all its registered apprentices of the withdrawal of recognition for Federal purposes; the effective date thereof; and that such withdrawal removes the apprentice from coverage under any Federal provision applicable to his/her individual registration under a program recognized or registered by the Secretary of Labor for Federal purposes.

(g) A State Apprenticeship Agency or Council whose recognition has been withdrawn pursuant to this part may have its recognition reinstated upon presentation of adequate evidence that it has fulfilled, and is operating in accordance with, the requirements of this part.

(Approved by the Office of Management and Budget under OMB control no. 1205-0223)

[42 FR 10139, Feb. 18, 1977, as amended at 49 FR 18295, Apr. 30, 1984]

APPENDIX J

California Labor Code,
Section 1777.5
(West, 1989 Cumul. Pocket Part)

§ 1777.5. Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade; exemptions; contributions

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract, employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section.

There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as otherwise provided in this section.

The contractor or subcontractor if he is covered by this section upon the issuance of the approval certificate, or if he has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a craft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned is of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided they are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the area of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor

Standards Enforcement is authorized to enforce the payment of such contributions to the fund or funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

(2)

No. 90-1191

Supreme Court, U.S.
FILED
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OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1990

OPERATING ENGINEERING & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,

Petitioners,

vs.

WEISS BROS. CONSTRUCTION CO., dba WEISSCAL, et al.,

Respondents.

Petition For A Writ Of Certiorari To The Court Of Appeal Of The State Of California

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

An ERISA employee benefit plan was created as a result of a collective bargaining agreement. The plan establishes an apprenticeship training program and requires signatory employers to adhere to the program and to contribute to an ERISA apprenticeship fund.

Does ERISA's express preemption of "any and all state laws insofar as they may now or hereafter relate to any employee benefit plan" supersede a state law that seeks to coerce nonsignatory employers into complying with the ERISA plan and contributing to the ERISA fund?

LIST OF AFFILIATED CORPORATIONS

Weiss Brothers Construction Company, Inc., dba Weisscal Company, has no parents, subsidiaries, or affiliates.

Fidelity and Deposit Company of Maryland has no affiliates. Its parents and subsidiaries are Swiss Reinsurance Company, Zurich Insurance Company, and Fidelity and Deposit Company.

TABLE OF CONTENTS

Page

INTRODUCTION 1

STATEMENT OF THE CASE 1

REASONS FOR DENYING THE WRIT 3

A. NO IMPORTANT FEDERAL QUESTION IS PRESENTED 3

B. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT 5

1. Labor Code Section 1777.5, Under The Circumstances Of This Case, Is Preempted By ERISA 5

2. Preemption of Labor Code Section 1777.5 Does Not Impair Federal Law 8

3. The Clear and Explicit Provisions of ERISA Are Conclusive Evidence of Legislative Intent 10

CONCLUSION 13

TABLE OF AUTHORITIES

Page

CASES

American Tobacco Co. v. Patterson, 456 U.S. 63 (1982) 11

Boise Cascade Corp. v. Peterson, 735 F.Supp. 1434 (D.Minn. 1990) 4

FMC Corporation v. Holliday, 498 U.S. ___, 112 L.Ed.2d 356 (1990) 6, 7

Hydrostorage, Inc. v. Northern Cal. Boilermakers, 891 F.2d 719 (9th Cir. 1989) ..... *passim*

Hydrostorage, Inc. v. Northern Cal. Boilermakers, 685 F.Supp. 718 (N.D. Cal. 1988) 4, 9

Ingersoll-Rand Co. v. McClendon, 498 U.S. ___, 112 L.Ed.2d 474 (1990) 8

Mallard v. U.S. District Court of Iowa, 490 U.S. 296 (1989) 11

Mills Music, Inc. v. Snyder, 469 U.S. 153 (1985) 11

Operating Engineers & Participating Employers etc. Fund v. Weiss Bros. Construction Co., 221 Cal. App. 3d 867 (1990) 3, 4, 5

Perrin v. United States, 444 U.S. 37 (1979) 11

Shaw v. Delta Air Lines, Inc., 463 U.S. 85 (1983) ..6, 10

STATUTES

12 U.S.C. §1001 5

12 U.S.C. §1002 5

TABLE OF AUTHORITIES – Continued

Page

29 U.S.C. §50 8

29 U.S.C. §1132 13

29 U.S.C. §1144 10

29 U.S.C. §1144(a) 6

29 U.S.C. §1144(c)(1) 6

29 U.S.C. §1144(c)(2) 6

29 U.S.C. §1144(d) 8, 9

California Labor Code section 1777.5 ..... *passim*

INTRODUCTION

Respondents Weiss Brothers Construction Co., Inc., dba Weisscal Company, David Weiss, Allen Weiss, and Fidelity and Deposit Company of Maryland (erroneously sued as Fidelity and Deposit Corporation) (collectively "Weiss") respectfully urge denial of the petition for writ of certiorari brought by Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund ("Apprenticeship Training Fund") and the Operating Engineers Joint Apprenticeship Committee for Northern California ("Joint Apprenticeship Committee" or "Committee").

STATEMENT OF THE CASE

The Joint Apprenticeship Committee, created by a collective bargaining agreement between a labor union and participating employers, promulgates apprenticeship standards for operating engineers. The standards govern an apprenticeship training program. Participating employers who are signatories to the collective bargaining agreement are obligated to comply with the Committee's standards and to contribute to the Apprenticeship Training Fund.

Weiss is not a participating employer and is not a party to the collective bargaining agreement. In 1985, Weiss was awarded a California public works contract. California Labor Code section 1777.5 provides that if a contractor who has been awarded a public works contract employs workers in an apprenticeable trade, the contractor must apply to the joint apprenticeship committee for a

certificate of approval. A contractor can obtain a certificate of approval by signing a "DAS 7" form prepared by the State of California Department of Industrial Relations.

Weiss, as it was required to do by section 1777.5, signed a DAS 7 form. The Joint Apprenticeship Committee also signed the form. As the project progressed, a dispute arose between Weiss and the Committee as to whether Weiss was complying with the apprenticeship training program and making the required contributions to the Apprenticeship Training Fund.

Petitioners sued Weiss in a California Superior Court for breach of contract. The "contract" was alleged to be the State's DAS 7 form. (Here, petitioners appear to assert that their breach of contract claim was based on the contract between the public entity and Weiss. (Petition at 6.) This assertion was never made in the California courts; the only alleged breach of contract pertained to the DAS 7 form.) Petitioners sought unpaid contributions to the Apprenticeship Training Fund (they concede in their petition, at page 7, that they do not know how much, if any, remains unpaid) and money damages for unpaid wages for apprentices that were not hired.

Weiss demurred to the complaint on the ground of ERISA preemption. Before the demurrer was heard, petitioners filed an amended complaint. Weiss again demurred. The trial court sustained the demurrer, ruling that petitioners' claims were preempted by ERISA, and dismissed the amended complaint. Petitioners filed a motion for reconsideration, submitting a proposed second amended complaint, which was denied.

A unanimous panel of the California Court of Appeal upheld the trial court's decision. (*Operating Engineers & Participating Employers etc. Fund v. Weiss Bros. Construction Co.*, 221 Cal.App.3d 867 (1990).) The California Supreme Court denied petitioners' request to review the Court of Appeal's decision.

REASONS FOR DENYING THE WRIT

A. NO IMPORTANT FEDERAL QUESTION IS PRESENTED

This case involves a California statute. The California courts have analyzed the statute in light of federal statutory and decisional law and have held that, to the extent it seeks to coerce nonsignatory employers to comply with an ERISA plan and contribute to an ERISA fund, the California statute is preempted by the express terms of ERISA. They have further held that the ERISA fund cannot evade ERISA's explicit preemption provisions by the simple expediency of filing a common law claim in a state court.

The highest court in California has refused to disturb the decision of the California Court of Appeal. This Court has declined to review a decision of the United States Court of Appeals for the Ninth Circuit, in a case indistinguishable from the present case on any relevant basis, interpreting the same California statute, and reaching the same preemption conclusions. (*Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, ___ U.S. ___, 111 S.Ct. 72, 112 L.Ed.2d 46 (1990).) The Ninth Circuit affirmed a district court decision that

also held section 1777.5, in the circumstances of this case, is preempted by ERISA. (*Hydrostorage, Inc. v. Northern Cal. Boilermakers*, 685 F.Supp. 718 (N.D. Cal. 1988).)

The decisions of the California courts and the federal courts that have examined the California statute are in complete harmony. The issue is settled in California, and settled in a fashion consistent with the express terms of ERISA and the decisions of this Court. Contrary to petitioners' assertion (Petition at 2-3), the issue is not destined to haunt the Court until it finally breaks down and grants review.[1]

The decision of the California Court of Appeal does not construe federal law in any new or unusual manner. To the contrary, it adopts the constructions employed by

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[1] Petitioners' contention that the district court decision in *Boise Cascade Corp. v. Peterson*, 735 F.Supp. 1434 (D.Minn. 1990) conflicts with *Hydrostorage* and *Operating Engineers* (Petition at 3 n.l) is wrong by a wide margin. *Boise* involved an administrative rule requiring a minimum apprentice-journeyman ratio at all jobsites where high pressure pipefitting was performed. (*Id.* at 1435.) The rule was adopted as a public safety measure because of the "danger posed by improperly installed high pressure piping." (*Id.* at 1437.) Because it was "a law of general application which applies to any jobsite where high pressure pipefitting is done" and *"does not require any employers to create or fund an ERISA plan nor does it affect any other primary administrative functions of ERISA"* (*Id.* at 1439, emphasis supplied), the district court found that the rule, which is not remotely similar to section 1777.5, was not preempted. *Boise* stands in sharp contrast to the facts here, where a nonsignatory employer is required by statute to contribute to an ERISA fund and comply with an ERISA plan. The district court's decision in Boise is on appeal to the United States Court of Appeals for the Eighth Circuit.

this Court and the federal courts of appeals, and, in light of these constructions, holds that a state law is preempted. California application of settled federal principles to a California statute does present an important federal question.

B. THE DECISION OF THE CALIFORNIA COURT OF APPEAL WAS CORRECT

1. Labor Code Section 1777.5, Under The Circumstances Of This Case, Is Preempted By ERISA

Petitioners concede that the Apprenticeship Training Fund is an ERISA fund. (Petition at 4.) They also concede that the standards promulgated by the Joint Apprenticeship Committee govern an apprenticeship training program. (*Ibid.*)

The Employee Retirement Income Security Act was enacted to regulate employee benefit plans on a national scale. (12 U.S.C. §1001.) Employee benefit plans are statutorily defined to include "any plan, fund, or program" established by an employer and a labor union to establish or maintain "apprenticeship or other training programs." (12 U.S.C. §1002.)

The Ninth Circuit gave effect to this plain statutory language, holding that an apprenticeship training program established by a joint apprenticeship committee, and the committee's governing standards, constitute an employee benefit plan. (*Hydrostorage*, 891 F.2d at 725-726.) The California Court of Appeal agreed. (*Operating Engineers*, 221 Cal.App.3d at 877, 879.)

"ERISA contains a very broad preemption clause. Section 514(a) of ERISA, as codified at 29 U.S.C. §1144(a), provides what ERISA 'shall supersede any and all state laws insofar as they may now or hereafter *relate to* any employee benefit plan described in section 1003(a) of this title. . . . ' 29 U.S.C. §1144(a) (emphasis added). 'State laws' are defined as 'all laws, decisions, rules, regulations, or other state action having the effect of law, of any state.' 29 U.S.C. §1144(c)(1). A 'state' is defined as 'a state, any political subdivisions thereof, or any agency or instrumentality of either, which purports to regulate, directly or indirectly, the terms and conditions of employee benefit plans, covered by this subchapter.' 29 U.S.C. §1144(c)(2)." (*Hydrostorage*, 891 F.2d at 726.)

The Court recently noted the sweeping nature of ERISA preemption:

> The pre-emption clause is conspicuous for its breadth. It establishes as an area of exclusive federal concern the subject of every state law that "relates to" an employee benefit plan governed by ERISA.

(*FMC Corporation v. Holliday*, 498 U.S. ___, 112 L.Ed.2d 356 (1990).)

Thus, Labor Code section 1777.5 is preempted to the extent it "relates to" and "purports to regulate," even indirectly, the Joint Apprenticeship Committee's standards and apprenticeship training program. "We made plain in *Shaw v. Delta Air Lines, supra*, that a law relates to an employee welfare plan if it has 'a connection with a reference to such a plan' . . . We based our reading in part on the plain language of the statute. Congress used the words " 'relate to' " in § 514(a) . . . in their broad sense'

. . . . It did not mean to pre-empt only state laws specifically designed to affect employee benefit plans. . . . [Limited pre-emption clauses] were rejected in favor of the present language in the Act, 'indicating that the section's pre-emptive scope was as broad as its language.' " (*FMC Corporation v. Holliday, supra.*)

Section 1777.5 requires nonsignatory employers to apply to joint apprenticeship committees for approval. "The very purpose of requiring [the employer] to apply was so that [the employer] would become bound by the standards, an ERISA plan. . . . Thus, the order [requiring compliance with section 1777.5] undoubtedly 'relates to' an ERISA plan in the sense that the order has a 'connection with or reference to' the standards." (*Hydrostorage*, 891 F.2d at 730.) Section 1777.5 also "purports to regulate" an ERISA plan:

> Section 1777.5 is aimed at enforcing the terms of an ERISA plan, the Standards, and compelling nonsignatory contractors to join or comply with such plans. The . . . statute is therefore one which is specifically designed to affect employee benefit plans. *See* [*Mackey v. Lanier Collections Agency & Service*, 486 U.S. 825, 108 S.Ct. 2182, 2185, 100 L.Ed.2d 836 (1988)]. ('[W]e have virtually taken it for granted that state laws which are specifically designed to affect employee benefit plans are preempted under §514(a)') (citations and internal quotations omitted).)

(*Hydrostorage*, 891 F.2d at 730.)

Having ruled that section 1777.5 relates to and purports to regulate an ERISA plan, the *Hydrostorage* court found that an order requiring the nonsignatory employer

to comply with the statute "falls within ERISA's preemption clause." (*Id.* at 730.)

If the present action had been permitted to proceed, the principal inquiry would have been whether Weiss had complied with the Joint Apprenticeship Committee apprenticeship training program, an ERISA plan. "Because the court's inquiry must be directed to the plan, this judicially created cause of action 'relates to' an ERISA plan." (*Ingersoll-Rand Co. v. McClendon*, 498 U.S. ___, 112 L.Ed.2d 474 (1990).) It is therefore preempted. (*Ibid.*)

2. Preemption of Labor Code Section 1777.5 Does Not Impair Federal Law

The *Hydrostorage* court also found that section 1777.5, in its effort to compel employers to comply with an ERISA plan they neither negotiated nor adopted, was not saved from preemption on the theory that a finding of preemption would "impair" the Fitzgerald Act, 29 U.S.C. §50. (*Hydrostorage*, 891 F.2d at 730-731.) The "savings clause" of the ERISA preemption statute provides that "[n]othing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States . . . or any rule or regulation issued under any such law." (29 U.S.C. §1144(d).) The Fitzgerald Act, however,

> merely directs the Secretary of Labor "to formulate and promote the furtherance of labor standards . . . to safeguard the welfare of apprentices" and related objectives. 29 U.S.C. §50. The implementing regulations state that their purpose is "to set forth labor standards to safeguard the welfare of apprentices, and to

> extend the application of such standards by prescribing policies and procedures concerning the registration, for certain federal purposes, [of] acceptable apprenticeship programs." 29 C.F.R. §29.1(b). Thus the regulations relate only to eligibility for federal registration. Neither they nor the Act itself contemplate enforcement mechanisms; section 29.11 merely provides for the voluntary adjustment of complaints before either federal or state agencies. Assuming §1777.5 was adopted in furtherance of the objectives of the Fitzgerald Act, it clearly is not an enforcement mechanism of federal law and to the extent orders under [§1777.5] are preempted by ERISA, federal law is not impaired.

(*Hydrostorage*, 891 F.2d at 731, quoting from the district court's decision, 685 F.Supp. at 722.) The Ninth Circuit adopted the lengthy analysis of the Fitzgerald Act issue conducted by the district court (Honorable William W. Schwarzer, District Judge) (685 F.Supp. at 721-723), which concluded that "[b]y no stretch of the imagination could §1777.5 be considered a state law the preemption of which would impair federal law." (*Id.* at 722.)

Petitioners mischaracterize the legal reasoning of District Judge Schwarzer and Circuit Judge Wallace as "simplistic" and "unnecessarily narrow." (Petition at 20.) Petitioners' contention that preemption would "impair" a "federal-state cooperative scheme" is so vague and overly broad that it is meaningless. 29 U.S.C. §1144(d) prohibits impairment of a law, rule, or regulation of the United States. It says nothing of impairing "schemes" purportedly "contemplated" by federal laws. (Petition at 20.) Petitioners have not and cannot identify any law, rule, or regulation of the United States that is "impaired" by the

ruling that is the subject of the petition. Section 1777.5 is not saved from preemption by 29 U.S.C. §1144.

3. The Clear and Explicit Provisions of ERISA Are Conclusive Evidence of Legislative Intent

The California Superior Court, the California Court of Appeal, the U.S. District Court for the Northern District of California and the U.S. Court of Appeals for the Ninth Circuit have all construed section 1777.5, have analyzed its relation to and regulation of ERISA plans, and have concluded that (1) section 1777.5 *does* relate to and regulate ERISA plans, (2) to the extent it does, the plain, explicit, and unambiguous provisions of ERISA mandate preemption, and (3) such preemption does not impair federal law.

Petitioners urge the Court to ignore the plain language of ERISA on the theory that its application may not be consistent with "congressional purpose." (Petition at 14-17.) Petitioners twice criticize the Ninth Circuit and the California Court of Appeal for employing dictionary definitions in their construction of ERISA, calling this approach "simplistic." (Petition at 9-10, 14 n. 16.) In scolding the California Court of Appeal for using a Black's Law Dictionary definition of "relate" (Petition at 9-10), petitioners apparently refer to the decision's reference to *this* Court's decision in *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85 (1983), in which Justice Blackmun, writing for a unanimous Court, employed a Black's Law Dictionary definition of the word "relate" in construing ERISA's preemption clause. (*Id.* at 97 n. 16.)

Justice Blackmun's analysis was not simplistic. It was consistent with established principles of statutory construction. "A fundamental canon of statutory construction is that, unless otherwise defined, words will be interpreted as taking their ordinary, contemporary, common meaning." (*Perrin v. United States*, 444 U.S. 37, 42 (1979).) In determining the ordinary and common meaning of words, the Court frequently refers to dictionary definitions. (*See, e.g., Mallard v. U.S. District Court of Iowa*, 490 U.S. 296, 301 (1989).)

> [I]n all cases involving statutory construction, our starting point must be the language employed by Congress, and we assume that the legislative purpose is expressed by the ordinary meaning of the words used. Thus absent a clearly expressed legislative intention to the contrary, that language must ordinarily be regarded as conclusive.

(*American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982), citations and internal quotations omitted.) "In construing a federal statute it is appropriate to assume that the ordinary meaning of the language that Congress employed 'accurately expresses the legislative purpose.' " (*Mills Music, Inc. v. Snyder*, 469 U.S. 153, 164 (1985), citation omitted.)

- Petitioners do not dispute that they administer an apprenticeship training program, as ERISA uses that term in its definition of an employee benefit plan.

- Petitioners do not dispute that section 1777.5 imposes the terms and conditions of their ERISA plan on nonsignatory employers, and requires nonsignatory employers to contribute to an ERISA trust fund.

- Petitioners cannot rationally dispute that section 1777.5 relates to their ERISA plan and ERISA trust fund.
- Petitioners do not dispute that ERISA preempts state law that relates to an employee benefit plan.
- Petitioners do not dispute that section 1777.5 is a state law or that their superior court breach of contract action seeks a "decision . . . having the effect of law." (29 U.S.C. §1144(c)(1).)

Giving the words of ERISA their common and ordinary meaning, section 1777.5 and petitioners' action to enforce that statute are expressly preempted. Petitioners having identified nothing in the legislative history that suggests Congress did not intend preemption in a case such as this, and Congress having expressly defined "employee benefit plan" to include apprenticeship training programs, the plain statutory language must be regarded as a conclusive expression of legislative purpose. Congress is conclusively presumed to have intended to preempt a state law such as section 1777.5 and state action to enforce such a law. Petitioners discussion of "congressional purpose" (Petition at 14-17), however applicable it may or may not be in other contexts, is plainly irrelevant in a case that falls so squarely within the clear preemptive provisions of ERISA.

Petitioners were not left without a remedy, their assertion to the contrary notwithstanding. (Petition at 8 n. 7.) Petitioners have claimed there was a private contractual agreement (because of the DAS 7 form) between Weiss and the Joint Apprenticeship Committee requiring Weiss to comply with the Committee's apprenticeship

training program. ERISA provides for civil enforcement of its provisions and authorizes federal civil actions seeking damages, equitable relief, and attorney's fees. (29 U.S.C. §1132.) Presumably for some perceived tactical reason, petitioners chose to forego their rights under 29 U.S.C. §1132 and instead brought a prohibited state court breach of contract action. (Despite petitioners' suggestion that "eager" apprentices will recoup "thousands of hours of man-hours of vital apprentice training" if their lawsuit is reinstated (Petition at 3), their complaint was solely for money damages allegedly owed the Apprenticeship Training Fund. This lawsuit never sought to compel Weiss to train apprentices.)

The decision of the California Court of Appeal is correct, well reasoned, and reaches the only possible result consistent with the clear language of ERISA. It is consistent with the conclusions of federal courts confronted with the same federal preemption issue. The issue is correctly settled in California, and there is no split of authority in the circuit courts of appeals. No important federal issue is presented for this Court's review.

CONCLUSION

For the reasons set forth herein, the petition for writ of certiorari should be denied.

Dated: February 21, 1991.

SEDGWICK, DETERT, MORAN
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Attorneys for Respondents

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No. 90-1191

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, and THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

v.

WEISS BROS. CONSTRUCTION CO. dba WEISSCAL, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

---

BRIEF *AMICI CURIAE* OF SEVEN APPRENTICESHIP TRAINING TRUST FUNDS AND U.A. LOCAL NO. 393 IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether a contract for apprenticeship training between an employer, a state, and an apprenticeship training trust fund, operating under a state apprenticeship training program recognized by the United States Department of Labor, is unenforceable by the trust fund because the Employee Retirement Income Security Act does not expressly authorize employee benefit trust funds to enforce such contracts in a private cause of action.

TABLE OF CONTENTS

	Page
INTEREST OF THE AMICI CURIAE	2
SUMMARY OF ARGUMENT	3
REASONS THE WRIT SHOULD ISSUE	4
I. CERTIORARI SHOULD ISSUE BECAUSE THE CALIFORNIA COURT OF APPEAL INTERFERED WITH THE OPERATION OF THE NATIONAL APPRENTICESHIP ACT, BY IMPROPERLY FINDING ENFORCEMENT OF CONTRACTS OF APPRENTICESHIP TRAINING UNDER THAT ACT PREEMPTED BY SECTION 514(a) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT	4
II. THE CALIFORNIA COURT OF APPEAL ERRED IN FINDING THAT ENFORCEMENT OF A CONTRACT FOR APPRENTICESHIP TRAINING "RELATE[S] TO AN EMPLOYEE BENEFIT PLAN" UNDER SECTION 514(a) OF ERISA	7
CONCLUSION	11
APPENDIX A	
National Apprenticeship Act (Fitzgerald Act), Section 1, 29 U.S.C. Section 50	1a
APPENDIX B	
California Labor Code, Section 1777.5	2a

TABLE OF AUTHORITIES

CASES Page

Associated Builders & Contractors, Inc. v. McDonald, 731 F. Supp. 966 (D.Nev. 1989) 9
Boise Cascade Corp. v. Peterson, 735 F. Supp. 1434 (D. Minn. 1990) 5
Fort Halifax Packing Co. v. Coyne, 482 U.S. 1, 107 S. Ct. 2211, 96 L.Ed.2d 1 (1987) 8, 9, 10
Hozier v. Midwest Fasteners, Inc., 908 F.2d 1155 (3rd Cir. 1990) 10
Hydrostorage, Inc. v. Northern Calif. Boilermakers Local Joint Apprenticeship Comm., 891 F.2d 719 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S. Ct. 72, 112 L.Ed.2d 46 (1990) 7
Ingersoll-Rand Co. v. McClendon, —— U.S. ——, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) 8
Mackey v. Lanier Collections Agency, 486 U.S. 825, 108 S. Ct. 2182, 100 L.Ed.2d 836 (1988) 8
Massachusetts Life Ins. Co. v. Russell, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) 8
Moore v. Reynolds Metals Co. Retirement Program, 740 F.2d 454 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S. Ct. 786, 83 L.Ed.2d 780 (1985) 9
Musto v. American General Corp., 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S. Ct. 1745, 104 L.Ed.2d 182 (1989) 10
Phillips v. Amoco Oil Co., 789 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S. Ct. 1893, 95 L.Ed.2d 500 (1987) 10
Pilot Life Ins. Co. v. Dedeaux, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987) 8
Shaw v. Delta Air Lines, 463 U.S. 85, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983) 7
Siuslaw Concrete Const. v. Washington Dept. of Transportation, 784 F.2d 952 (9th Cir. 1986) 5

STATUTES

23 U.S.C. Section 113(c) 5
23 U.S.C. Sections 101-158 5
National Apprenticeship Act (Fitzgerald Act):
29 U.S.C. Section 50 ..... 3-7, 9

TABLE OF AUTHORITIES—Continued

	Page
Taft-Hartley Act:	
29 U.S.C. Section 186(c)	2
29 U.S.C. Section 186(c)(6)	5
Employee Retirement Income Security Act:	
29 U.S.C. Section 1001, *et seq.*	*passim*
Section 514(d), 29 U.S.C. Section 1144(a)	3, 4, 6-8
Section 514(d), 29 U.S.C. Section 1144(d)	3, 6
California Labor Code Section 1777.5	6, 8
REGULATIONS	
29 C.F.R. Sections 29.1-29.13 (1990)	4
29 C.F.R. Section 29.12	6
LEGISLATIVE HISTORY	
H. Rep. No. 93-807, 93rd Cong., 2d Sess. (1974), U.S. Code Cong. and Admin. News 4670, 4677	10

IN THE

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OCTOBER TERM, 1990

No. 90-1191

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, and THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

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WEISS BROS. CONSTRUCTION CO. dba WEISSCAL, *et al.*,
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On Petition for Writ of Certiorari to the Court of Appeal of the State of California

---

BRIEF *AMICI CURIAE* OF SEVEN APPRENTICESHIP TRAINING TRUST FUNDS AND U.A. LOCAL NO. 393 IN SUPPORT OF PETITIONERS

Come now the Amici Curiae, Pipe Trades District Council No. 36 Apprenticeship Training Fund, U.A. Local No. 343 Journeyman and Apprentice Training Trust Fund, U.A. Local No. 342 Apprenticeship and Training Trust Fund, Pipe Trades Apprentice and Journeymen Training Trust Fund for San Mateo County, Insulation and Asbestos Industry Workers of Northern California and

Local No. 16 Apprentice Training Trust Fund, Operative Plasterers Local Union No. 66 Journeyman and Apprentice Training Trust Fund, and Sacramento-Stockton Plastering Industry Joint Apprenticeship and Training Trust Fund (hereinafter the Trust Funds), and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, Local Union No. 393 (hereinafter U.A. Local No. 393), and submit this brief in support of the Petition for Writ of Certiorari in No. 90-1191.

INTEREST OF THE AMICI CURIAE

The Trust Funds are multiemployer trust funds, established pursuant to Section 302(c) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 186(c). All of the Trust Funds are employee welfare benefit trust funds within the meaning of the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001, *et seq.* The Trust Funds administer apprenticeship training programs which have been approved by the California Division of Apprentice Standards, which itself is regulated by the United States Department of Labor Bureau of Apprenticeship Training. U.A. Local No. 393 appoints Trustees or directors to two apprenticeship training programs approved by the Division of Apprenticeship Standards. The Trust Funds appear on their own behalf and on behalf of their enrolled apprentice trainees. U.A. Local No. 393 appears on behalf of its members who are apprentice trainees in one of the apprenticeship training programs with which it is affiliated.

The Amici's apprenticeship training programs have been successfully operating continuously since the 1950's. They have trained thousands of apprentices, under rigorous four- or five-year programs. A substantial portion of the on-the-job experience of these apprentices has been on public works of construction. In the operation of their training programs, the Trust Funds and the U.A. Local

No. 393 apprenticeship training programs enter into numerous tripartite contracts of apprenticeship training, called DAS-7 agreements, with the State of California and building and construction contractors on public works jobs in California. The enforceability of these agreements was the subject matter of the case at hand. If the Court does not grant certiorari, and reverse the opinion below, the Trust Funds and the U.A. Local No. 393 apprenticeship training programs will not be able to enforce their contracts of apprenticeship training, which will adversely affect their ability to provide apprenticeship training to all of the employees covered under their training programs. Furthermore, the ability of all apprentices, whether in a union-sponsored apprenticeship program or not, to gain the on-the-job experience essential to apprenticeship training, will be harmed if the State of California is held to be powerless to enforce a requirement that contractors employ apprentices as part of their obligation under their contract for a work of public construction.

SUMMARY OF ARGUMENT

1. The Court should grant certiorari in this case because the California Court of Appeal has interfered with the operation of the National Apprenticeship Act (the Fitzgerald Act), by improperly finding enforcement of contracts for apprenticeship training under that Act preempted by Section 514(a) of the Employee Retirement Income Security Act.

a. The federal laws governing apprenticeship training establish a system of cooperation among federal and state governments, employers, and apprenticeship training programs, under which all of those parties have duties, in order to fulfill the purposes of the Fitzgerald Act.

b. As a matter which is regulated by federal law, contracts for apprenticeship training are saved from preemption under Section 514(a) of the Employee Retirement Income Security Act by Section 514(d).

2. The California Court of Appeal erred in finding that enforcement of a contract for apprenticeship training relates to an employee benefit plan under the Employee Retirement Income Security Act.

a. The Court and numerous lower courts have recognized limitations on the subject matter covered under the Employee Retirement Income Security Act and the scope of preemption by that Act.

b. A building and construction contractor's decision to enter into a contract for apprenticeship training is a business decision, which is beyond the scope of the Employee Retirement Income Security Act, and therefore not preempted by it.

REASONS THE WRIT SHOULD ISSUE

I. CERTIORARI SHOULD ISSUE BECAUSE THE CALIFORNIA COURT OF APPEAL INTERFERED WITH THE OPERATION OF THE NATIONAL APPRENTICESHIP ACT, BY IMPROPERLY FINDING ENFORCEMENT OF CONTRACTS OF APPRENTICESHIP TRAINING UNDER THAT ACT PREEMPTED BY SECTION 514(a) OF THE EMPLOYEE RETIREMENT INCOME SECURITY ACT.

The primary law governing the education of apprentices in the United States is the National Apprenticeship Act of 1937, 29 U.S.C. Section 50, otherwise known as, and hereinafter referred to as the Fitzgerald Act. (Appendix A, *infra.*) In accordance with powers conferred by the Fitzgerald Act, the United States Department of Labor, through the Bureau of Apprenticeship Training, has developed a comprehensive program of apprenticeship regulations and practices. 29 C.F.R. Sections 29.1-29.13 (1990).

The history of federal laws on apprenticeship reflects the intent of Congress to have federal law control the subject matter, but not to the exclusion of states and private parties where they serve federal purposes. In 1937,

Congress envisioned that state agencies, employers, and labor would each have a role in apprenticeship training programs. This can be seen from the Fitzgerald Act itself which specifically instructs the Secretary of Labor to "bring together employers and labor for the formulation of programs of apprenticeship, [and] to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship . . . ." 29 U.S.C. Section 50.

Although the Court has never addressed the role of the various parties involved, lower courts have recognized the cooperative nature of apprenticeship law. For example, in *Siuslaw Concrete Const. v. Washington Dept. of Transportation*, 784 F.2d 952 (9th Cir. 1986), the Ninth Circuit upheld state regulation of the wages of uncertified apprentices on a highway construction project which was subject to federal regulation under the Fitzgerald Act and the Federal Aid-Highways Program, 23 U.S.C. Sections 101-158, and in particular 23 U.S.C. Section 113(c), which incorporated certified apprenticeship programs. *See also Boise Cascade Corp. v. Peterson*, 735 F. Supp. 1434 (D. Minn. 1990) (upholding state apprenticeship training program.)

Since the passage of the Fitzgerald Act, Congress has altered the role of the various parties involved in apprenticeship training, but has not altered the basic cooperative nature of the apprenticeship system. The Taft-Hartley Act of 1947 established the current system of fringe benefit trust funds, jointly administered by labor and management. Section 302(c)(6) of the Labor Management Relations Act of 1947, as amended, 29 U.S.C. Section 186(c)(6). While this limited the role of labor, the primary effect has been to institutionalize labor-management cooperation in the provision of all fringe benefits, including apprenticeship training.

In 1974, Congress further regulated the roles of employers, labor and trustees by enacting the Employee

Retirement Income Security Act, 29 U.S.C. Sections 1001 *et seq.* (hereinafter ERISA). ERISA expressly preempts state laws which relate to an employee benefit plan, with certain limited exceptions. Section 514(a) of ERISA, 29 U.S.C. Section 1144(a). However, Congress also made it clear that ERISA was not intended to undermine the operation of other federal laws:

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair, or supersede any law of the United States (except as provided in Sections 1031 [concerning prior law] and 1137(c) [concerning the role of employees of the United States in regulation of private trust funds] of this title, or any rule or regulation issued under any such law.

ERISA Section 514(d), 29 U.S.C. Section 1144(d). With respect to apprenticeship training, the effect of Section 514(d) is to preserve the Fitzgerald Act, and the cooperative system which it established.

The California law at issue, California Labor Code Section 1777.5 (Appendix B, *infra*), is part of that cooperative system. California's apprenticeship program has been recognized by the Bureau of Apprenticeship Training, under Section 29.12 of the Bureau's regulations issued under the Fitzgerald Act. Section 1777.5 itself establishes a cooperative program among the State of California, employers, and apprenticeship training trust funds. Section 1777.5 requires that contractors on public works employ apprentices from a recognized apprenticeship training program, and contribute to that training program. The DAS-7 agreement is the contract for apprenticeship training among the State, the apprenticeship training program, and the contractor, in which the parties agree to fulfill their various duties, and which allows private enforcement if a party fails to fulfill its duties.

Enforcement of DAS-7 agreements by joint labor-management trust funds is essential to the operation of this federally-recognized apprenticeship training program

and to the purposes of the Fitzgerald Act. Joint trust funds depend almost exclusively on contributions from contractors whose employees receive the benefits of the funds' apprenticeship programs. If DAS-7 agreements cannot be enforced, the ability of joint trust funds to provide apprentice training will be seriously harmed. The Ninth Circuit has already denied apprenticeship training trust funds a federal forum for actions to enforce DAS-7 agreements in *Hydrostorage, Inc. v. Northern Calif. Boilermakers Local Joint Apprenticeship Comm.*, 891 F.2d 719 (9th Cir. 1989), *cert. denied*, —— U.S. ——, 111 S. Ct. 72, 112 L.Ed.2d 46 (1990). The effect of the decision below in this case would be to prevent apprenticeship training trust funds from taking legal action to receive compensation for training they provide to the employees of contractors on California public works. Certiorari should issue, and the opinion below be reversed, to protect the operation of the Fitzgerald Act through cooperation between the federal and state governments, employers and labor. Apprenticeship training in all fifty states will be crippled until this issue is resolved by this Court.

II. THE CALIFORNIA COURT OF APPEAL ERRED IN FINDING THAT ENFORCEMENT OF A CONTRACT FOR APPRENTICESHIP TRAINING "RELATE[S] TO AN EMPLOYEE BENEFIT PLAN" UNDER SECTION 514(a) OF ERISA.

The scope of preemption of state laws by ERISA is limited to laws which "relate to any employee benefit plan . . . ." ERISA Section 514(a), 29 U.S.C. Section 1144(a). The Court has declared that Section 1144(a) is to be read broadly, and encompasses any law which "has a connection with, or reference to [an employee welfare benefit] plan." *Shaw v. Delta Air Lines*, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L.Ed.2d 490 (1983). A broad reading of Section 514(a) serves to "round out the protection afforded participants by eliminating the threat of conflicting and inconsistent State and local regulation." 463

U.S. at 99. Broad preemption of state law is particularly relevant when the subject law provides a greater remedy *against a plan* than authorized by federal law, one effect of which would be to reduce the benefits payable to other beneficiaries. *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 107 S. Ct. 1549, 95 L.Ed.2d 39 (1987). *See also Massachusetts Life Ins. Co. v. Russell*, 473 U.S. 134, 105 S. Ct. 3085, 87 L.Ed.2d 96 (1985) (No punitive damages may be awarded against Trustees); and *Ingersoll-Rand Co. v. McClendon*, —— U.S. ——, 111 S. Ct. 478, 112 L.Ed.2d 474 (1990) (State law remedy for violation of employee's right under ERISA held preempted.)

However, the Court has also recognized limitations on the preemption of state law by Section 514(a). In *Mackey v. Lanier Collections Agency*, 486 U.S. 825, 108 S. Ct. 2182, 100 L.Ed.2d 836 (1988), the Court upheld the application of a state garnishment law to welfare benefit plans. The welfare benefits which the state sought to attach were not within the scope of ERISA's anti-alienation clause or otherwise protected from garnishment. The Court was not willing to use Section 514(a) to expand the anti-alienation clause, which would have had the effect of preempting a garnishment law of general application. 486 U.S. at 836-37.

In *Fort Halifax Packing Co. v. Coyne*, 482 U.S. 1, 107 S. Ct. 2211, 96 L.Ed.2d 1 (1987), the Court also upheld a state law requiring the payment of severance pay. The Court rejected the argument that "'plan' should in effect be read out of [Section 514(a)]." 482 U.S. at 8. The Court drew a distinction between laws that regulated plans, which were preempted, and those that regulated only benefits, which were not. Furthermore, preemption of the subject state law would not have served the purposes of preemption. 482 U.S. at 10-12.

The preemption of California Labor Code Section 1777.5 would not promote any of the policy concerns which led to the results in the cited cases. First, the threat of in-

consistent regulation of apprenticeship training programs is minimal. No state agency may regulate apprenticeship training programs without the approval of the United States Department of Labor Bureau of Apprenticeship Training. While there may be variations in training programs, these are no different from the variations in the welfare benefits provided under other ERISA-covered plans.

Second, California Labor Code Section 1777.5 is a law of general application which should not be preempted by ERISA. All building and construction contractors who work on California public works are covered by that law. However, employers may provide the required apprenticeship training in a variety of ways. An employer may operate its own training program, or enter into an agreement with a joint labor-management trust fund or with a multiple employer plan (with no labor participation). *See, e.g., Associated Builders & Contractors, Inc. v. McDonald,* 731 F. Supp. 966 (D. Nev. 1989). In other words, the existing apprenticeship training system is a multi-faceted approach, which does not require contributions to joint labor-management trust funds. However, when an employer elects that option, the purposes of ERISA and the Fitzgerald Act are served by allowing the trust fund with whom the employer has contracted for apprenticeship training services to enforce that contract.

Third, and most importantly, the Court must not allow the lower courts to abolish the distinction recognized in *Fort Halifax Packing.* The primary purpose of ERISA is to assure the participants and beneficiaries of employee benefit plans that they would receive the benefits which an employer has promised to provide. However, the decision to provide benefits is a business decision, which is not within the scope of ERISA, and therefore, not within the scope of preemption by ERISA. *See, e.g., Moore v. Reynolds Metals Co. Retirement Program,* 740

F.2d 454, 456 (6th Cir. 1984), *cert. denied*, 469 U.S. 1109, 105 S. Ct. 786, 83 L.Ed.2d 780 (1985) ("Neither Congress nor the Courts are involved in the decision to establish a plan or in the decision concerning which benefits a plan should provide," citing H. Rep. No. 93-807, 93rd Cong. 2d Sess. (1974), U.S. Code Cong. and Admin. News 4670, 4677.)

The Court has not had occasion to address this distinction since *Fort Halifax Packing*, and some members of the Court questioned the distinction drawn in that case when that decision was rendered. 482 U.S. at 23-26, White, J. dissenting. However, the distinction between business decisions and ERISA-covered administrative actions is a valuable tool which courts have used often to determine where the broad scope of ERISA ends. This distinction is particularly valuable where there is a federally-regulated apprenticeship training program, and the business decision is how an employer will fulfill its obligations under that program.

Lower courts have applied this distinction in numerous contexts. For example, in *Musto v. American General Corp.*, 861 F.2d 897 (6th Cir. 1988), *cert. denied*, 490 U.S. 1020, 109 S. Ct. 1745, 104 L.Ed.2d 182 (1989), the Sixth Circuit held that the company's decision to terminate retiree welfare benefits was a business decision, outside the scope of ERISA fiduciary duties. In *Phillips v. Amoco Oil Co.*, 789 F.2d 1464 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016, 107 S. Ct. 1893, 95 L.Ed.2d 500 (1987), the Eleventh Circuit held that the terms of a purchase and sale agreement were a matter for the employer acting as employer, and therefore not within the scope of ERISA. And again in *Hozier v. Midwest Fasteners, Inc.*, 908 F.2d 1155 (3rd Cir. 1990), the Third Circuit held that the company's decision to terminate a severance plan was a business decision, and therefore not covered by ERISA.

Just like a decision to provide those other benefits, an employer's decision how to provide apprenticeship training is not covered under ERISA. Extending ERISA preemption to prevent enforcement of DAS-7 agreements by trust funds encroaches on business decisions not covered by ERISA, and poses a threat of extending ERISA itself into matters which Congress clearly intended to be free from regulation under that Act. The Court can prevent that result only by granting certiorari and reversing the decision below.

CONCLUSION

For the reasons stated above, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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APPENDICES

APPENDIX A

National Apprenticeship Act (Fitzgerald Act),
Section 1,
29 U.S.C. § 50

Section 50. Promotion of labor standards of apprenticeship

The Secretary of Labor is authorized and directed to formula and promote the furtherance of labor standards necessary to safeguard the welfare of apprentices, to extend the application of such standards by encouraging the inclusion thereof in contracts of apprenticeship, to bring together employers and labor for the formulation of programs of apprenticeship, to cooperate with State agencies engaged in the formulation and promotion of standards of apprenticeship, and to cooperate with the Office of Education under the Department of Health, Education, and Welfare in accordance with section 17 of Title 20. . .

APPENDIX B

California Labor Code,
Section 1775
(West, 1989 Cumul. Pocket Part)

§ 1777.5 Employment of registered apprentices; wages; standards; number; apprenticeable craft or trade exemptions; contributions

Nothing in this chapter shall prevent the employment of properly registered apprentices upon public works.

Every such apprentice shall be paid the standard wage paid to apprentices under the regulations of the craft or trade at which he is employed, and shall be employed only at the work of the craft or trade to which he is registered.

Only apprentices, as defined in Section 3077, who are in training under apprenticeship standards and written apprentice agreements under Chapter 4 (commencing at Section 3070), Division 3, of the Labor Code, are eligible to be employed on public works. The employment and training of each apprentice shall be in accordance with the provisions of the apprenticeship standards and apprentice agreements under which he is training.

When the contractor to whom the contract is awarded by the state or any political subdivision, or any subcontractor under him, in performing any of the work under the contract or subcontract employs workmen in any apprenticeable craft or trade, the contractor and subcontractor shall apply to the joint apprenticeship committee administering the apprenticeship standards of the craft or trade in the area of the site of the public work for a certificate approving the contractor or subcontractor under the apprenticeship standards for the employment and training of apprentices in the area or industry affected; provided, however, that the approval as established by the joint apprenticeship committee or committees shall

be subject to the approval of the Administrator of Apprenticeship. The joint apprenticeship committee or committees, subsequent to approving the subject contractor or subcontractor, shall arrange for the dispatch of apprentices to the contractor or subcontractor in order to comply with this section. There shall be an affirmative duty upon the joint apprenticeship committee or committees administering the apprenticeship standards of the craft or trade in the area of the site of the public work to ensure equal employment and affirmative action in apprenticeship for women and minorities. Contractors or subcontractors shall not be required to submit individual applications for approval to local joint apprenticeship committees provided they are already covered by the local apprenticeship standards. The ratio of apprentices to journeymen who shall be employed in the craft or trade on the public work may be the ratio stipulated in the apprenticeship standards under which the joint apprenticeship committee operates, but in no case shall the ratio be less than one apprentice for each five journeymen, except as provided in this section.

The contractor or subcontractor if he is covered by this section upon the issuance of the approval certificate, or if has has been previously approved in such craft or trade, shall employ the number of apprentices or the ratio of apprentices to journeymen stipulated in the apprenticeship standards. Upon proper showing by the contractor that he employs apprentices in such craft or trade in the state on all of his contracts on an annual average of not less than one apprentice to each five journeymen, the Division of Apprenticeship Standards may grant a certificate exempting the contractor from the 1-to-5 ratio as set forth in this section. This section shall not apply to contracts of general contractors involving less than thirty thousand dollars ($30,000) or 20 working days or to contracts of specialty contractors not bidding for work through a general or prime contractor, involving less than

two thousand dollars ($2,000) or fewer than five working days.

"Apprenticeable craft or trade," as used in this section, shall mean a chaft or trade determined as an apprenticeable occupation in accordance with rules and regulations prescribed by the Apprenticeship Council. The joint apprenticeship committee shall have the discretion to grant a certificate, which shall be subject to the approval of the Administrator of Apprenticeship, exempting a contractor from the 1-to-5 ratio set forth in this section when it finds that any one of the following conditions is met:

(a) In the event unemployment for the previous three-month period in such area exceeds an average of 15 percent, or

(b) In the event the number of apprentices in training in such area exceeds a ratio of 1 to 5, or

(c) If there is a showing that the apprenticeable craft or trade is replacing at least one-thirtieth of its journeymen annually through apprenticeship training, either (1) on a statewide basis, or (2) on a local basis.

(d) If assignment of an apprentice to any work performed under a public works contract would create a condition which would jeopardize his life or the life, safety, or property of fellow employees or the public at large or if the specific task to which the apprentice is to be assigned or of such a nature that training cannot be provided by a journeyman.

When such exemptions are granted to an organization which represents contractors in a specific trade from the 1-to-5 ratio on a local or statewide basis the member contractors will not be required to submit individual applications for approval to local joint apprenticeship committees, provided thay are already covered by the local apprenticeship standards.

A contractor to whom the contract is awarded, or any subcontractor under him, who, in performing any of the work under the contract, employs journeymen or apprentices in any apprenticeable craft or trade and who is not contributing to a fund or funds to administer and conduct the apprenticeship program in any such craft or trade in the area of the site of the public work, to which fund or funds other contractors in the era of the site of the public work are contributing, shall contribute to the fund or funds in each craft or trade in which he employs journeymen or apprentices on the public work in the same amount or upon the same basis and in the same manner as the other contractors do, but where the trust fund administrators are unable to accept such funds, contractors not signatory to the trust agreement shall pay a like amount to the California Apprenticeship Council. The contractor or subcontractor may add the amount of such contributions in computing his bid for the contract. The Division of Labor Standards Enforcement is authorized to enforce the payment of such contributions to the fund of funds as set forth in Section 227.

The body awarding the contract shall cause to be inserted in the contract stipulations to effectuate this section. Such stipulations shall fix the responsibility of compliance with this section for all apprenticeable occupations with the prime contractor.

All decisions of the joint apprenticeship committee under this section are subject to the provisions of Section 3081.

(4)

No. 90-1191

MOTION FILED
FEB 20 1991

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1990

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,
vs.
WEISS BROS. CONSTRUCTION CO. DBA WEISSCAL, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

CARPENTERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE FUND FOR SOUTHERN CALIFORNIA
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TABLE OF CONTENTS

	Page
Table of Authorities	iii
MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITIONER'S PETITION FOR WRIT OF CERTIORARI	1
BRIEF OF CARPENTERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE FUND AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI	3
I	
AMICUS AND ITS INTEREST	3
II	
ARGUMENT	5
A. THE COURT SHOULD ISSUE *CERTIORARI* IN THIS CASE IN ORDER TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW, A QUESTION UPON WHICH THE UNITED STATES CIRCUIT COURTS OF APPEAL HAVE DIFFERED	5
B. THE CASE INVOLVES THE FUNDAMENTAL AND IMPORTANT QUESTION OF THE CIRCUMSTANCES UNDER WHICH ERISA COVERAGE ATTACHES TO A RELATIONSHIP BETWEEN AN EMPLOYER AND AN INDEPENDENTLY EXISTING ERISA PLAN	6
C. THE COURT OF APPEALS UNCRITICALLY APPLIED THE *HYDROSTORAGE* DECISION TO THIS CASE	7

TABLE OF CONTENTS

Page

D. WHETHER "APPRENTICESHIP STANDARDS" CONSTITUTE AN ERISA PLAN IS A FACTUAL QUESTION THAT CAN BE RESOLVED ONLY BY A REVIEW OF ALL RELEVANT FACTS RESPECTING THE PARTICULAR EMPLOYER INVOLVED .. 9

E. COMPLIANCE WITH APPRENTICESHIP STANDARDS PURSUANT TO CALIFORNIA LABOR CODE SECTION 1777.5 DOES NOT CREATE A COMPULSORY ERISA PLAN RELATIONSHIP FOR THE INVOLVED EMPLOYER 10

1. The Court of Appeals Applied ERISA's Definitions Selectively 10

2. Multiple Employer Trust Cases Establish That Intent is the Touchstone For Determining Whether Subscribing Employers Have Created An ERISA Plan 11

III

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

	Page
Credit Managers Association v. Kennesaw Life & Accident Insurance Co., 809 F.2d 617 (9th Cir. 1987)	9, 13
Donovan v. Dillingham, 668 F.2d 1169 (11 Cir. 1982), modified en banc, 688 F.2d 1367 (11th Cir. 1982)	12, 13, 14
Ed Miniat, Inc. v. Globe Life Insurance Group, Inc., 805 F.2d 732 (7th Cir. 1986)	13
Fort Halifax Packing Company v. Coyne, 482 U.S. 1 (1987)	12
Hydrostorage v. Northern California Boilermakers, 891 F.2d 719 (9th cir. 1989), *cert. denied*, 111 S. Ct. 403, 112 L.Ed.2d 46 (1990)	*passim*
Kanne v. Connecticut General Life Insurance Co., 859 F.2d 96 (9th Cir. 1989)	9
Matthew 25 Ministries, Inc. v. Corcoran, 771 F.2d 21 (2d Cir. 1985)	14
Operating Engineers Apprentice Training Fund v. Weisscal, 221 Cal.App.3d 867, 270 Cal.Rptr. 786 (1990)	7, 8
Taggart Corp. v. Life and Health Benefits Administration, Inc., 617 F.2d 1208 (5th Cir. 1980), *cert. denied sub nom. Taggart Corp. v. Efros*, 450 U.S. 1030 (1981)	12, 13, 14
Turnbow v. Pacific Mutual Insurance Co., 765 P.2d 1160 (Nev. Sup. Ct. 1988)	14
Wisconsin Education Association Insurance Trust v. Iowa State Board of Public Education, 804 F.2d 1059 (8th Cir. 1986)	15

Statutes

Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA") ..... *passim*

ERISA Section 3(5), 29 U.S.C. § 1003(5) 10

Fitzgerald Act, 29 U.S.C. § 50, et seq. 4, 6, 16

Labor Management Relations Act of 1974, as amended, Section 302(c)(6), 29 U.S.C. § 186(c)(6) 3

California Labor Code § 1777.5 .....2, 3, 4, 7, 8, 10

Regulations

29 C.F.R. 2510.3-1(j) 11

No. 90-1191

In the Supreme Court
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OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

vs.

WEISS BROS. CONSTRUCTION CO. DBA WEISSCAL, et al.,
Respondents.

On Petition for Writ of Certiorari to the Court of Appeal of the State of California

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Fund") hereby moves the Court for leave to file an *amicus curiae* brief in support of Petitioner's Petition for a writ of certiorari in this matter. Fund has requested consent of all respondents to file this *amicus* brief. Petitioners have consented.

Respondents have informed Fund that they are willing to consent to the filing of only one *amicus* brief supporting the petition. Numerous amici wish to file briefs in support of the petition. Accordingly, Fund files this Motion.

This Motion is based upon the facts and legal conclusions of the underlying case. The decision that is the subject of the petitioned-for writ ruled that the Employee Retirement Income Security Act of 1974, 29 U.S.C. Section 1001 et seq., preempted Petitioner's contract action against the respondent contractor and associated persons and entities. One petitioner is, like Fund, a Taft-Hartley trust fund financing apprenticeship benefits. The other is a related joint apprenticeship committee. Respondent Weisscal is a contractor who was performing "public works" for the State of California. California Labor Code Section 1777.5 required Respondent to provide apprenticeship training on the one project involved. Weisscal entered into an agreement with Petitioners to this end, through a form provided by California, known as a DAS-7. This form contractually bound Weisscal to comply with Petitioner's general financing and training requirements.

When Weisscal failed to comply with its contractual contribution and training obligation Petitioners filed a contractual action in state court seeking to collect contractual liquidated damages or "pay-in-lieu", and unpaid contributions. The court sustained Weisscal's demurrer to the complaint on the basis that ERISA completely preempted the Petitioners' causes of action.

Movant Fund operates under California Labor Code Section 1777.5 and the court's decision has significant consequences for the Fund itself and the employers, labor organizations and joint labor-management organizations affiliated with the Fund. These entities are obliged to and

do provide financing and training for carpenter craft apprentices over the entire Southern California area.

BRIEF OF CARPENTERS JOINT APPRENTICESHIP AND TRAINING COMMITTEE FUND AS AMICUS CURIAE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

AMICUS AND ITS INTEREST

Carpenters Joint Apprenticeship and Training Committee Fund for Southern California ("Fund") is an express trust fund subject to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"), established and existing for the purpose of receiving contributions, holding them in trust, and paying the expenses of a carpenter craft apprenticeship training program in eleven Southern California counties, i.e., Los Angeles, Orange, San Bernardino, Riverside, Imperial, Ventura, Santa Barbara, San Luis Obispo, Kern, Inyo, and Mono. The Fund is constituted pursuant to Section 302(c)(6) of the Labor-Management Relations Act of 1947, as amended, 29 U.S.C. § 186(c)(6), and is commonly referred to as a Taft-Hartley Trust. Representatives of the Carpenters' Union sit as labor Trustees on the Fund, as well as an equal number of management Trustees. The Fund actually provides and pays for classrooms and certain other training provided to carpenter craft apprentices in the eleven Southern California counties involved. The fund operates in conjunction with the Carpenters Joint Apprenticeship Trust Committee ("Committee"), the body charged under California Labor Code § 1777.5 with approving public works contractor applications to train carpenter craft apprentices in its geographic areas, arranging for the dispatch of same, and

administering Carpenter Apprentice Standards. Under § 1777.5 the contractor contributes to the Fund "in the same amount or upon the same basis and in the same manner as the other contractors do", or makes payments to the California Apprenticeship Council ("CAC"), a state apprenticeship agency constituted in compliance with federal apprenticeship law.

The court below has dismissed as ERISA preempted an action undertaken by a similar "Fund" and a Training Committee ("Committee") to recover liquidated damages, "pay-in-lieu" and/or delinquent apprenticeship contributions from a contractor that had executed a training agreement with the Committee pursuant to California Labor Code § 1777.5. The Fund's interest in this proceeding is in part financial — the loss of contributions from employers who obtain apprentices from the associated Committee and who pay the Fund for the costs of their formal training by virtue of the state laws involved in this case. Employers who are *not* signatory to collective bargaining agreements with the Carpenters' Union or to subscription agreements with the Fund pay into the Fund pursuant to these state laws.

In addition, the Fund desires a settled delineation of the scope and extent of preemption of the state apprenticeship laws that are, by virtue of the Fitzgerald Act, 29 U.S.C. § 50, et seq., a primary reason for the Fund's existence. Brief of *amicus curiae* is desirable in this matter because the scope of ERISA preemption of state apprenticeship laws and enforcement mechanisms is largely undetermined and is of critical importance to every state apprenticeship agency and ERISA apprenticeship fund, as well as to the United States Bureau of Apprenticeship Standards, the federal agency that approves state apprenticeship programs.

ERISA preemption of state public works "fair labor" laws is a developing area of critical financial and practical importance to multiple entities and persons, both private and public. The decision below is also significant to the larger question of ERISA preemption of state laws in general, the subject of many recent Supreme Court decisions.

II.

ARGUMENT

A. THE COURT SHOULD ISSUE *CERTIORARI* IN THIS CASE IN ORDER TO SETTLE AN IMPORTANT QUESTION OF FEDERAL LAW, A QUESTION UPON WHICH THE UNITED STATES CIRCUIT COURTS OF APPEAL HAVE DIFFERED

The Court should issue *certiorari* in this case because the Court of Appeals has decided an important question of federal law which has not been, but should be, settled by this Court. That question is whether "apprenticeship standards" are ERISA plans vis-a-vis an employer compelled by state prevailing wage law to comply with them on discrete state public works projects. Both the California Supreme Court and the court in *Hydrostorage v. Northern California Boilermakers,* 891 F.2d 719 (9th Cir. 1989), *cert. denied,* ____ U.S. ____, 111 S. Ct. 403, 112 L. Ed. 2d 46 (1990), the linchpin of the decision here, have reached their decision on this question in a way that conflicts with the decisions of various United States Circuit Courts of Appeal, including the Ninth Circuit itself. A difference in opinion exists between the Fifth Circuit and the Seventh, the Ninth and the Eleventh concerning the fundamental question of what action by an

individual employer is required to create an ERISA plan as to that employer.

B. THE CASE INVOLVES THE FUNDAMENTAL AND IMPORTANT QUESTION OF THE CIRCUMSTANCES UNDER WHICH ERISA COVERAGE ATTACHES TO A RELATIONSHIP BETWEEN AN EMPLOYER AND AN INDEPENDENTLY EXISTING ERISA PLAN

The decision in this case has important consequences for not only California's public work's prevailing wage law, but for similar prevailing wage laws in as many as 28 other states operating under the National Apprenticeship Act, 29 U.S.C. § 50.

Case law discloses that an employer's intention to assume responsibility, as revealed by all relevant surrounding circumstances, determines whether that employer has so associated itself with an existing ERISA plan that the relationship between the plan and the employer is governed by ERISA. The fundamental question is whether the employer has evidenced an intent to indefinitely continue providing ERISA-covered benefits. Absent an express statement otherwise, the employer's lack of involvement either directly or indirectly in the ownership, control, or administration of the plan indicates that the employer has not assumed the responsibility for continuing ERISA covered benefits, and the association is not one governed by ERISA.

The Court of Appeals and the *Hydrostorage* court neither considered nor applied applicable guiding principles developed in the most analogous line of cases; those involving multiple employer trusts providing welfare benefits of a type covered by ERISA.

Plaintiffs in this case did not pursue defendant under Erisa, but rather under state law. They have never sought in any fashion to subject defendant to any of the strictures of ERISA. Defendant never complied in any significant way with the obligations imposed by state law, and certainly never undertook any effort to comply with ERISA as to its relationship with the plaintiffs and the apprenticeship program in general. Defendant is not trying to protect from complicating and restrictive state regulation a program of benefits that it has established or maintained for the good of its employees. Rather, defendant is trying to invalidate a contract that it entered into with the state and plaintiffs that was wholly beneficial to its employees, the industry, the state, and, under the Fitzgerald Act, the United States. These circumstances call for application of ERISA's public policy against permitting purely commercial interests to exploit its preemption provisions solely for personal economic gain.

C. THE COURT OF APPEALS UNCRITICALLY APPLIED THE *HYDROSTORAGE* DECISION TO THIS CASE

The court of Appeals characterized this case as possessing "great similarity" to *Hydrostorage* in that "Both cases involve the attempt to enforce section 1777.5 and bind a non-signatory employer to the terms of a collectively bargaining apprenticeship trust fund and standards covered by ERISA". *Operating Engineers Apprentice Training Fund v. Weisscal,* 221 Cal.App.3d 867, 879, 270 Cal.Rptr. 786, 993 (1990). The court in fact did little more than recount almost verbatim the *Hydrostorage* decision.

A key element of the court's decision is its application of the *Hydrostorage* determination that the apprenticeship "standards" involved in *Hydrostorage* were an ERSIA

plan.[1] While the *Hydrostorage* court engaged in some factual analysis of the standards, unlike the Appellate Court here, it did not analyze the relationship of the involved employer to those standards in a sufficiently substantive manner for ERISA purposes.

The *Hydrostorage* court's determination that the involved apprentice standards were an ERISA plan was absolutely critical to the disposition of that case. The district court had not decided that the standards were an ERISA plan. Rather it decided only that the "Apprenticeship Program" was such a plan, without specifying what it meant by that term. 891 F.2d at 727. The circuit court decision on the standards was *de novo.*

Because § 1777.5 compels a contractor to comply with applicable apprenticeship standards, both the *Hydrostorage* court and the Appellate Court concluded that it compelled participation in an ERISA "plan". Committee does not take issue with the proposition that ERISA preempts a state law that compels participation in an ERISA plan. Committee argues that the apprenticeship standards here and in *Hydrostorage* are not ERISA plans

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[1]The instant case was decided on a demurrer to the complaint, and the *Hydrostorage* decision did not issue until briefing had concluded. Weisscal called the case to the attention of the court and the parties filed supplemental briefs on *Hydrostorage's* "analytical impact". *Weisscal,* 221 Cal.App.3d at 873, 270 Cal.Rptr. at 789. Unlike the *Hydrostorage* court, the Court of Appeals did not review in detail or at all the apprenticeship standards actually involved in this case. These standards were not presented in their entirety to the trial court until after the demurrer was sustained, in a motion for reconsideration. While both excerpts from and the complete Standards were contained in the record on appeal, nothing in the opinion indicates that the Court of Appeals actually reviewed the Standards or the extent to which they were incorporated by reference in the DAS-7 agreement.

vis-a-vis the involved employers, and that "apprenticeship standards" are not per se ERISA plans for all those who have a relationship with them, as the Appellate Court necessarily held in this case.

D. WHETHER "APPRENTICESHIP STANDARDS" CONSTITUTE AN ERISA PLAN IS A FACTUAL QUESTION THAT CAN BE RESOLVED ONLY BY A REVIEW OF ALL RELEVANT FACTS RESPECTING THE PARTICULAR EMPLOYER INVOLVED

The existence of an ERISA plan is a question of fact to be answered in light of all the surrounding circumstances from the point of view of a reasonable person. *Kanne v. Connecticut General Life Insurance Co.*, 859 F.2d 96, (9th Cir. 1989), citing *Credit Managers Association v. Kennesaw Life & Accident Insurance Co,* 809 F.2d 617, 625 (9th Cir. 1987).

In *Credit Managers,* a case involving insurance policies and an association of unrelated employers, the court reversed entry of a summary judgement determination that ERISA plans were not involved because of the existence of factual questions with respect to the individual employers. In *Kanne* the existence of language within the plan documents stating that it was an ERISA plan was a relevant factor.

E. COMPLIANCE WITH APPRENTICESHIP STANDARDS PURSUANT TO CALIFORNIA LABOR CODE SECTION 1777.5 DOES NOT CREATE A COMPULSORY ERISA PLAN RELATIONSHIP FOR THE INVOLVED EMPLOYER

1. The Court of Appeals Applied ERISA's Definitions Selectively.

The *Hydrostorage* court (and the Court of Appeals by outright adoption) utilized a very literal, definitional type approach in deciding that the Apprenticeship Standards were an ERISA plan. They treated the question as a unitary one not dependent upon the relationship of the particular employer to the standards. In doing so, however, they omitted and ignored critical language from the relevant ERISA definitions and caselaw.

The *Hydrostorage* court quoted part of ERISA's definition of an employee welfare benefit plan in its analysis of why the Standards were a plan. 891 F.2d at 727. It omitted the words 'to the extent that such plan fund or program was established or is maintained [to provide benefits for participants or their beneficiaries]".

While the court determined that the Standards were established by the Committee and that the Committee was "an employer or . . . employee organization, or . . . both", it did not examine ERISA's definition of employer and how that definition limits the definition of an employee welfare benefit plan.

Under ERISA an employer is defined as "any person acting directly as an employer, or indirectly in the interest of an employer, in relation to an employee benefit plan . . .". ERISA Section 3(5), 29 U.S.C. § 1003(5). Since the definition of employee welfare benefit plan incorporates the definition of employer, the terms "acting

. . . in relation to" limit not only the definition of an ERISA employer, but also the definition of a welfare plan.

To paraphrase ERISA's definitions then, an employer is an employer with respect to what is in general an ERISA plan only if it acts directly or indirectly as an employer in relation to the plan, by establishing or maintaining it.

2. Multiple Employer Trust Cases Establish That Intent Is The Touchstone For Determining Whether Subscribing Employers Have Created An ERISA Plan.

What qualifies as acting in relation to a plan? It is not enough that an ERISA plan is "establish[ed] or maintain[ed]" by some unrelated party for those verbs are themselves contained in the definition of plans, and the terms "acting in relation to" would be redundant. ERISA is a "reticulated" statute, and none of its provisions have thus far been determined to be redundant, though not a model of legislative drafting.

Committee submits that the answer lies, at least partly, in the intention of the specific employer involved. This is one of the "surrounding circumstances" that must be reviewed to determine whether an ERISA plan is involved, vis-a-vis the specific employer.

This issue has been intensively addressed in the context of cases involving health insurance obtained through "multiple employer" trusts, and the Department of Labor has issued regulations concerning same. *See* 29 C.F.R. 2510.3-1(j). These cases provide useful guidance because they involve employers who "subscribe to" an arrangement with an outsider that is in the business of providing ERISA-type benefits. Unlike this case, however, the employers in multiple employer trust cases are not under a

direct legal compulsion to subscribe. As a result, their action in "voluntarily" subscribing tends to indicate more of a "commitment" to providing such benefits on a continuing basis than does mere compliance with a law requiring subscription as to a discrete prevailing wage project. *See generally, Fort Halifax Packing Company v. Coyne,* 482 U.S. 1 (1987).

Perhaps the seminal case in the multiple employer trust area is *Taggart Corp. v. Life and Health Benefits Administration, Inc.,* 617 F.2d 1208 (5th Cir. 1980), *cert. denied sub nom. Taggart Corp. v. Efros,* 450 U.S. 1030 (1981). In *Taggart* the court found that neither a trust providing group insurance to small employers nor an individual employer's subscription to that insurance constituted a "plan, fund, or program" within the meaning of ERISA, because the employer "neither directly nor indirectly owns, controls, administers or assumes responsibility for the policy or its benefits". *Taggart,* 617 F.2d at 1211. The court referred to the history, structure and purposes of ERISA to reject the Secretary of Labor's assertion that an individual employer's naked act of subscribing to the trust was itself the creation of a plan. Such trusts do not provide benefits gratuitously, of course, so employers must make payments to such trusts. The courts have not viewed such payments as per se establishing or maintaining an ERISA plan, however.

Taggart was followed by *Donovan v. Dillingham,* 668 F.2d 1169 (11th Cir. 1982), *modified en banc,* 688 F.2d 1367 (11th Cir. 1982). The Eleventh Circuit was created out of the Fifth and the *Dillingham* court initially held that the *Taggart* decision was controlling precedent. In its *en banc* decision, however, the court reversed itself, partially adopted the Secretary's theory, and limited *Taggart.* However, the court did not agree with the Secretary's

contention that "establishing" a plan meant nothing more than an ultimate decision by an employer to provide a benefit covered by ERISA. *Dillingham,* 688 F.2d at 1372.

Dillingham makes clear that the relationship of the individual employer to what is in general an ERISA plan is critical. The court did not determine "how many subscribers established or maintained plans". It specifically noted that it was not clear from the record that all subscribers had established an employee benefit plan. *Dillingham,* 688 F.2d at 1374 & n.15.

In section III of its *en banc* opinion the *Dillingham* court recounted numerous facts indicating that many of the subscriber employers, employee organizations, or both, were "committed to providing benefits to employees or members . . . on a continuing basis", and "anticipated continuing furnishing of such benefits". 688 F.2d at 1374. The court thereby placed great emphasis on the intention of the subscribing party. *Accord, Ed Miniat, Inc. v. Globe Life Insurance Group, Inc.,* 805 F.2d 732 (7th Cir. 1986), *Credit Managers Association v. Kennesaw Life and Accident Insurance Co.,* 809 F.2d 617 (9th Cir. 1987).

As for structural elements, the *Dillingham* court held that a plan is established under ERISA if from the surrounding circumstances a reasonable person could ascertain the intended benefits, a class of beneficiaries, the source of the financing, and procedures for receiving benefits. 688 F.2d at 1372-73. While these structural elements are necessary for a plan to exist, they are not sufficient, for the commitment to provide the benefits on a continuing basis must also exist.

One court has harmonized *Taggart* and *Dillingham* by observing that *Taggart,* like *Dillingham,* in fact requires that the employer intend to guarantee continuation of the

benefits. *Turnbow v. Pacific Mutual Insurance Co.*, 765 P.2d 1160 (Nev. Sup. Ct. 1988). The employer here obviously had no intent to continue or guarantee any apprenticeship benefit beyond the one specific public works job involved.

In both *Taggart* and *Dillingham* the defendants were seeking to avoid ERISA coverage. The *Dillingham* court applied ERISA's purpose to "protect working men and women from abuses in the administration and investment of private retirement plans and employee welfare plans" to find the arrangements there within ERISA's scope. *Dillingham, supra,* 688 F.2d at 1370.

In *Matthew 25 Ministries, Inc. v. Corcoran,* 771 F.2d 21 (2d Cir. 1985), Matthew failed in its attempt to gain ERISA coverage in order to avoid regulation by New York State. The court closely examined ERISA's definitions, in the same manner as the *Hydrostorage* court. Matthew claimed it was an "employer" within the meaning of ERISA, as an "association of employers" acting "in the interest of an employer . . . in relation to an employee benefit plan". The court held that this wasn't enough, that Matthew first had to show that its trust was "established or maintained" by its individual employer members. The court made this statement even though the subscribing employers were paying Matthew for providing benefits. It held that Matthew had failed to "disclose what role, if any, its mixed-bag group of enrollees plays in the management of its trust", and therefore failed to show that it was covered by ERISA. *Matthew,* 771 F.2d 22. The court cited *Taggart* for this proposition, among other cases. The evident policy advanced in *Matthew* was to prevent what are functionally insurance companies from escaping state insurance regulation by simply marketing their product

as an ERISA plan through a "multiple employer trust" arrangement.

Wisconsin Education Association Insurance Trust v. Iowa State Board of Public Education, 804 F.2d 1059 (8th Cir. 1986), supports the view that ERISA does not govern the relationship between Weisscal and the Apprenticeship Standards here. The court in *Wisconsin*, relying on ERISA's definitions, found no ERISA coverage because the solely-union sponsored Trust covered employees that were not members of the union, even though it provided coverage only to employees of school districts having collective bargaining agreements with a union sponsor of the Trust.

The situation here is similar because Weisscal is not a "union employer" and its employees in general are not union members, although particular apprentices who might be dispatched might be. Rather than finding that the union-management sponsored plan in this case is not in general an ERISA plan, it is far more reasonable to determine that neither it nor the apprentice standards themselves are an ERISA plan vis-a-vis Weisscal.

III.

CONCLUSION

The Court should review this case to establish a uniform approach towards ERISA coverage and preemption in "subscription" situations. The state interests involved are substantial and worthy of protection as furthering explicit federal policy under the Fitzgerald Act. Employer intention to create or maintain a plan in subscription situations, as disclosed by all surrounding circumstances should be the touchstone for ERISA coverage and preemption. The limited and circumscribed subscription to apprenticeship standards that occurred here due solely to state law does not disclose the requisite employer intention. ERISA coverage and preemption should not be found in these circumstances.

Dated: February 20, 1991

Respectfully submitted,

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OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

VS.

WEISS BROS. CONSTRUCTION CO. dba WEISSCAL, et al.,
Respondents.

MOTION TO FILE BRIEF OF AMICI CURIAE AND BRIEF OF AMICI CURIAE LOS ANGELES, ORANGE, SAN BERNARDINO-RIVERSIDE, VENTURA AND SANTA CLARA COUNTIES ELECTRICAL JOINT APPRENTICESHIP AND EDUCATIONAL TRAINING COMMITTEES, AND THE SHEET METAL WORKERS' LOCALS 104 AND 162 JOINT APPRENTICESHIP TRAINING COMMITTEES IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

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TABLE OF CONTENTS

	Page
INTEREST OF AMICI CURIAE	5
SUMMARY OF ARGUMENT	8
ARGUMENT	9
I	
UNDER THE COURT OF APPEAL'S DECISION, A STATE'S RIGHT TO ENFORCE APPRENTICESHIP STANDARDS NECESSARY TO PROTECT THE HEALTH, WELFARE AND SAFETY OF APPRENTICES COULD BE EVISCERATED	9
II	
THE COURT OF APPEAL'S DECISION IMPAIRS THE IMPLEMENTATION OF THE FEDERAL FITZGERALD ACT, UNDER WHICH THE FEDERAL GOVERNMENT HAS ABDICATED ITS RESPONSIBILITY FOR THE ENFORCEMENT OF APPRENTICESHIP STANDARDS TO THE STATES	14
CONCLUSION	20
APPENDIX	A & B

TABLE OF AUTHORITIES

Cases

Page

Aetna Life Insurance Co. v. Borges, 869 F.2d 142, 145-47 (2nd Cir. 1989), *cert. den.*, ____ U.S. ____, 107 L.Ed.2d 25 (1989) 11

Associated Builders and Contractors, Inc. v. McDonald, 731 F.Supp. 966, 969 (D. Nev. 1989) 15

Beard v. Carrollton R.R., 893 F.2d 117, 123 (6th Cir. 1989) 19

Boise Cascade Corp. v. Peterson, 735 F.Supp. 1434, 1439 (D. Minn. 1990) *appeal pending* No. 90-5328 MN (8th Cir.) (oral argument heard October, 1990) 11, 13

Calhoun v. F.D.I.C., 653 F.Supp. 1288, 1293 (N.D. Tex. 1987) 19

Connors v. Amax Coal Co., Inc., 858 F.2d 1226, 1231 (7th Cir. 1988) 19

Franchise Tax Board v. Construction Laborers Vacation Trust, 204 Cal.App.3d 955, 963 (1988) 11

Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee, 891 F.2d 719 (9th Cir. 1989), *cert. den.*, ____ U.S. ____, 111 S.Ct. 72 (1990) 13, 17, 18

I.A.M. National Pension Fund, et al. v. Slyman Industries, 704 F.Supp. 301, 302 (D. D.C. 1989) 19

In Re Matter of Goff, 706 F.2d 574, 786-7 (5th Cir. 1983) 19

Lane v. Goren, 743 F.2d 1337 (9th Cir. 1984) 11

Metropolitan Life Insurance Co. v. Massachusetts, 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985) 10

TABLE OF AUTHORITIES

CASES

Page

Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, et al. vs. Weiss Bros. Construction Co. d/b/a Weisscal, et al., 221 Cal.App.3d 867, 877-79 (1990) 2

Pension Benefit Guarantee Corp. v. LTV Corp., 875 F.2d 1008, 1016 (2nd Cir. 1989) 18

Rebaldo v. Cuomo, 749 F.2d 133, 138 (2nd Cir. 1984), *cert. den.*, 472 U.S. 1008, 86 L.Ed.2d 718 (1985) 11

Shaw v. Delta Airlines, 463 U.S. 85, 103 S.Ct. 2890, 2902-03, 77 L.Ed.2d 490 (1983) 17, 18

Statutes

California Code of Regulations, Title 8, Sec. 208 16

California Code of Regulations, Title 8, Sec. 212 ..... 7, 10, 16

California Code of Regulations, Title 8, Sec. 212(a)(5) 10

California Code of Regulations, Title 8, Sec. 212(b)(6) 10

California Code of Regulations, Title 8, Sec. 212(c)(12) 10

California Code of Regulations, Title 8, Sec. 212.2 16

California Government Code Sec. 12940(c) 12

California Labor Code Sec. 1777.5 13

California Labor Code Sec. 3073 10

Civil Rights Act of 1964, Title VII 17

Davis-Bacon Act, 40 U.S.C. Sec. 276a 13

TABLE OF AUTHORITIES

STATUTES

	Page
Employee Retirement Income Security Act of 1974, Sec. 3(1), 29 U.S.C. Sec. 1002(1)	2, 12
Employee Retirement Income Security Act of 1974, Sec. 514(a) of ERISA, 29 U.S.C. Sec. 1144(a)	7
Employee Retirement Income Security Act of 1974, Sec. 514(d), 29 U.S.C. Sec. 1144(d)	3, 8, 14, 17, 18, 19
Rules of the United States Supreme Court, Rule 37.2	1
United States Fitzgerald Act, 29 U.S.C. § 50	3, 8, 9, 15, 16, 19, 20

Miscellaneous

Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, Prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, April 1976, Volume II, p. 2364, Vol. III, p. 4671	20
1974 U.S. Code Congressional and Administrative News, 4639, 4655, 4838, 4871	12-13

No. 90-1191

In the Supreme Court
OF THE
United States

OCTOBER TERM 1990

OPERATING ENGINEERS & PARTICIPATING EMPLOYERS PRE-APPRENTICE, APPRENTICE AND JOURNEYMAN AFFIRMATIVE ACTION TRAINING FUND, AND THE OPERATING ENGINEERS JOINT APPRENTICESHIP COMMITTEE FOR NORTHERN CALIFORNIA,
Petitioners,

VS.

WEISS BROS. CONSTRUCTION CO. dba WEISSCAL, et al.,
Respondents.

MOTION FOR LEAVE TO FILE BRIEF OF AMICI CURIAE

COME NOW the Electrical Joint Apprenticeship and Educational Training Committees for Los Angeles, Orange, San Bernardino, Riverside, Ventura and Santa Clara Counties, and the Sheet Metal Workers' Locals 104 and 162 Joint Apprenticeship and Training Committees, Amici Curiae herein, and, pursuant to Rule 37.2 of the Rules of this Court, hereby respectfully request that this Court grant leave to file the accompanying Brief in support of the petition for writ of certiorari to the Court of Appeal of the State of California. The Petitioners, Operat-

ing Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, and The Operating Engineers Joint Apprenticeship Committee For Northern California, have consented to the filing of this Brief, whereas Respondents Weiss Bros. Construction Co. d/b/a Weisscal, David Weiss, and Allen Weiss have not. The bases for this motion are as follows:

1. Amici Curiae operate apprenticeship training programs in the electrical and sheet metal industries in the greater Northern and Southern California areas. According to the state Court of Appeal's decision, such training programs constitute "employee welfare benefit plans" within the meaning of § 3(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. § 1002(1).

2. Amici Curiae provide training to their apprentices in the electrical and sheet metal industries by means of certain "standards" which they have adopted under state law and regulation and which have been approved by the State of California. In its decision in this proceeding, the California Court of Appeal held that such apprenticeship training standards constitute "employee welfare benefit plans" within the meaning of ERISA and that an apprenticeship trust fund or joint apprenticeship committee's attempts to enforce them by means of a civil action in the state courts are barred by the ERISA preemption doctrine. See *Operating Engineers & Participating Employers Pre-Apprentice, Apprentice and Journeyman Affirmative Action Training Fund, et al. vs. Weiss Bros. Construction Co. d/b/a Weisscal, et al.*, 221 Cal.App.3d 867, 877-79 (1990); Petition for Writ of Certiorari, Appendix B-11 to B-14. Amici Curiae are vitally interested in the potential impact of the Court of Appeal's decision on their rights to

maintain and enforce training standards which they have adopted and which are necessary to ensure the health, safety, welfare and proper instruction of the apprentices training in their programs.

3. Amici Curiae are also concerned with the Court of Appeal's overly narrow reading of § 514(d) of ERISA, 29 U.S.C. § 1144(d), particularly insofar as it failed to take into account the federal government's historical practice of abdicating the enforcement of apprenticeship standards to the states. Because it is the states and not the federal government which essentially regulate apprenticeship training in this country, the Court of Appeal's decision would impair the implementation of the United States Fitzgerald Act, 29 U.S.C. § 50, which formally recognizes that policy and depends on the state governments and their administrative agencies for its enforcement.

Accordingly, these Amici Curiae respectfully request that leave be granted as requested and that their accompanying Brief be filed and considered by the Court.

Respectfully submitted,

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INTEREST OF AMICI CURIAE

Amici Curiae are not unmindful of the fact that it is common practice for litigants before this Court to sound alarums in hope of persuading the Court that their cause, among all others, are worthy of the Court's attention. Nevertheless, this Court should not remain unsuspecting of the serious consequences which logically follow from the ruling of the California Court of Appeal: that the State of California's inherent right to enforce training standards necessary for the safe and proper training of apprentices in this state, which the State has enforced over the last fifty years, is now threatened by a cramped and misinformed reading of the ERISA preemption doctrine which ultimately undermines Congressional intent. Indeed, as is obvious from a review of the Court of Appeal's decision, its opinion threatens to eviscerate not only the State of California's right to enact and enforce health and safety standards for the training of apprentices, but those of all of the states and their administrative agencies generally.

Amicus Curiae Los Angeles County Electrical Joint Apprenticeship and Educational Training Committee is an apprenticeship training committee jointly sponsored by the Los Angeles County Chapter of the National Electrical Contractors Association (N.E.C.A.) and the International Brotherhood of Electrical Workers (I.B.E.W.) Local 11. It is one of the largest electrical apprenticeship training programs in the United States, and has trained thousands of electricians in the electrical construction industry over the past thirty years. It is presently training over 600 apprentices, all of whom complete a rigorous five year training program in which they receive both on-the-job and classroom instruction in all facets of the electrical trade.

The Orange County, San Bernardino-Riverside Counties, Ventura County, and Santa Clara County Electrical Joint Apprenticeship and Educational Training Committees are four separate training committees which also provide training for apprentices under collective bargaining agreements between N.E.C.A. Chapters and I.B.E.W. Local Unions in their areas. These Committees also are presently training hundreds of apprentice electricians, and have decades of experience in turning out competent and qualified craftsmen in the electrical industry. Like the apprentices who graduate from the Los Angeles County training program, the apprentices who train with these Committees ultimately become the competent journeymen electricians who still perform the lion's share of the more sophisticated high-rise, commercial, and industrial electrical construction work in this nation.

Amici Curiae Sheet Metal Workers' Locals 104 and 162 Joint Apprenticeship and Training Committees operate similar training programs in Northern California, including San Francisco, San Mateo, Alameda, Contra Costa, Monterey, Santa Cruz, Santa Clara, Sacramento, Sonoma and Marin counties. These joint apprenticeship committees also have a vital interest in the proper, safe and competent instruction of their apprentices in the highly-skilled sheet metal trade, and in the enforcement of their training standards on construction projects on which their apprentices are employed.

Like Petitioners Operating Engineers Trust Fund and its Joint Apprenticeship Committee, Amici Curiae herein train qualified workers in highly-skilled construction crafts in which safety and a fundamental knowledge of all aspects of the trade are of paramount importance. Accordingly, both Petitioners and Amici Curiae operate their programs under a comprehensive set of "training

standards" which specify the detailed training criteria for each apprentice in the program. Such criteria include adequate equipment and facilities for on-the-job training, instruction by skilled supervision, mobility between employers for the purposes of providing diversity of experience and breadth of training, and "supplemental" or classroom instruction of a minimum number of hours per year. As apprenticeship training programs approved by the State of California, both Petitioners and Amici Curiae adopted their training standards pursuant to a detailed set of state regulations governing the content of such standards. See Title 8, California Code of Regulations (C.C.R.) § 212, Appendix A to this Brief.

The Court of Appeal held in this proceeding that Petitioners' apprenticeship standards themselves constitute "employee welfare benefit plans" under ERISA and that a private action in state court to enforce those standards was preempted under § 514(a) of ERISA, 29 U.S.C. § 1144(a). Amici Curiae are interested in protecting the welfare of their apprentices by the enforcement of their standards, their ability to continue to require skilled, efficient, and safe training of their apprentices by contractors who sign "DAS-7" training agreements (as did Respondents), and the state's continued right to regulate apprenticeship training and enforce apprenticeship standards on state public works jobs. Amici Curiae are also vitally concerned that if decisions such as the Court of Appeal's are permitted to stand, training standards designed to further and promote the safe, efficient, and competent training of apprentices will be altogether vitiated, thereby potentially resulting in fewer training opportunities for apprentices, unsafe and hazardous construction, and resulting harm to the reputation of their industries as ones capable of providing competent and qualified craftsmen for our nation's ongoing construction

requirements. Amici Curiae are also interested in preserving the scheme of federal and state cooperation in the training of apprentices pursuant to the United States Fitzgerald Act, which has worked successfully for over fifty years.

Amici therefore have a plain and immediate interest in the outcome of these proceedings, primarily based on their right to continue to enforce their state-required and approved apprenticeship training standards as against contractors who, like Respondents, violate agreements to abide by them.

SUMMARY OF ARGUMENT

If permitted to stand, the Court of Appeal's decision would potentially eviscerate a state's right to enforce apprenticeship training standards enacted to protect the health, welfare and safety of apprentices training in its jurisdiction. Such a result is not warranted by ERISA's preemption provisions, under which Congress did not intend to preempt areas of traditional state regulation or the exercise of a state's police powers to protect the health, welfare, and safety of its citizens. Indeed, because there exist other kinds of plans covered by the definition of "employee welfare benefit plans" under ERISA which necessitate some state regulation, the Court of Appeal's ruling could set a dangerous precedent and lead to absurd and undesirable results. The Court should also grant certiorari in this proceeding because there is nothing in ERISA's legislative history which even begins to suggest a Congressional intent to intrude on a state's right to regulate apprenticeship training standards.

Additionally, the "savings clause" contained in § 514(d) of ERISA precludes a finding of preemption in these circumstances because the Court of Appeal's deci-

sion would impair the implementation of the federal Fitzgerald Act, under which the federal government has abdicated the responsibility of enforcing apprenticeship standards to the states. Practically speaking, if states are not permitted to regulate apprenticeship training without running afoul of the preemptive force of ERISA, the federal law in question will be reduced to a meaningless nullity, as the federal government has historically relied almost exclusively on the states to carry out the directives and purpose of the federal apprenticeship training law. In today's world economy, where competition abroad and economic complications at home have made the development of our own human resources all that more essential, the evisceration of our entire system for the training of qualified craftsmen should not depend on so hypertechnical and uninformed a reading of ERISA as the Court of Appeal's in the instant case.

ARGUMENT

I

UNDER THE COURT OF APPEAL'S DECISION, A STATE'S RIGHT TO ENFORCE APPRENTICESHIP STANDARDS NECESSARY TO PROTECT THE HEALTH, WELFARE AND SAFETY OF APPRENTICES COULD BE EVISCERATED.

This proceeding arises out of an attempt by Petitioners to enforce an "agreement to train apprentices" executed by Respondents under which the Respondents promised to hire and train apprentices in accordance with Petitioners' training program standards. As mentioned by Petitioners in their certiorari petition, the Respondents entered into the training agreement voluntarily and as a condition to their performing work on the San Jose Transit Mall Light Rail Project, a California state public

works job. The Court of Appeal ruled that Petitioners' attempt to enforce the training agreement through a civil action in the California state courts was preempted by ERISA.

As previously mentioned, Petitioners' standards with which Respondents agreed to abide were adopted pursuant to a detailed set of state regulations governing their content and conditions. Thus, 8 C.C.R. § 212 specifically requires that standards approved by the State Department of Industrial Relations, Division of Apprenticeship Standards (D.A.S.) contain various provisions for evaluating on-the-job training and related supplemental instruction, the ratio or number of apprentices to be employed, and the training and education of the apprentices in first aid, safe working practices, and in recognition of occupational health and safety hazards. See 8 C.C.R. § 212(a)(5), (b)(6), and (c)(12), Appendix A. These regulations are enforced by the State Division of Apprenticeship Standards pursuant to its statutory mandate to foster, promote and develop the welfare of the apprentice and industry, improve the working conditions of apprentices, and advance their opportunities for profitable employment. *See* Labor Code § 3073, Appendix B. As such, Petitioners' training standards were adopted pursuant to a state's exercise of its police power to protect the health, welfare, and safety of its citizens, which is beyond ERISA's preemptive reach.

The Supreme Court has cautioned against presuming that Congress intended to preempt areas of traditional state regulation through ERISA. *Metropolitan Life Insurance Co. v. Massachusetts,* 471 U.S. 724, 740, 105 S.Ct. 2380, 85 L.Ed.2d 728 (1985). The California appellate courts have also recognized that "the historic police powers of the states are not to be superseded by the

federal act unless that was the clear and manifest purpose of Congress." *Franchise Tax Board v. Construction Laborers Vacation Trust,* 204 Cal.App.3d 955, 963 (1988). The lower federal courts have also recognized that laws of general application enacted to further areas traditionally reserved to the states, such as occupational training and public safety, are beyond the scope of ERISA preemption. *See Boise Cascade Corp. v. Peterson,* 735 F.Supp. 1434, 1439 (D. Minn. 1990) *appeal pending* No. 90-5328 MN (8th Cir.) (oral argument heard October, 1990). Indeed, the Second Circuit Court of Appeal has specifically declined to find traditional exercises of state power or regulatory authority which has some impact on ERISA benefit plans to be preempted by the federal statute. *Aetna Life Insurance Co. v. Borges,* 869 F.2d 142, 145-47 (2nd Cir. 1989), *cert. den.,* ____ U.S. ____, 107 L.Ed.2d 25 (1989); *Rebaldo v. Cuomo,* 749 F.2d 133, 138 (2nd Cir. 1984), *cert. den.,* 472 U.S. 1008, 86 L.Ed.2d 718 (1985). It cannot seriously be questioned that, as in the above-cited cases, the State of California has in this instance exercised its legislative and regulatory authority for the purpose of providing quality construction, safe training, and the prevention of exploitation of generally younger people employed in apprenticeable crafts as a measure of its traditional police power to protect the health, safety and welfare of its citizenry.

Moreover, it is well established that apprenticeship programs such as Petitioners' are not immune from all regulation by the states merely because they may constitute "employee welfare benefit plans" under ERISA. In *Lane v. Goren,* 743 F.2d 1337 (9th Cir. 1984), the court held that a state's laws prohibiting discrimination in employment are not preempted by ERISA merely because they apply to apprenticeship training funds, as such laws neither "related to" nor "purported to regulate" the

employee benefit plan. The state anti-discrimination law, codified at California Government Code § 12940(c), continues to prevent discrimination on a variety of impermissible grounds by joint apprenticeship committees such as those of Petitioners and Amici Curiae.

In addition, an application of the Court of Appeal's reasoning to other welfare benefit plans covered by ERISA could lead to disastrous and absurd results. Under § 3(1) of the Act, 29 U.S.C. § 1002(1), day care centers and housing plans fit within the same definition of "employee welfare benefit plans" that includes "apprenticeship and other training programs." Under the Court of Appeal's reasoning, future litigants might be tempted to question the right of states to regulate health and safety standards for the operation of day-care centers or housing plans because they also constitute "employee welfare benefit plans" under ERISA. Such a result would, quite clearly, be in complete contravention to the time-honored ability of states to regulate matters vital to public safety and harmful to the public weal.

Importantly, there is nothing at all in the legislative history of ERISA which even suggests that the statute's preemptive scope should reach so far, or that Congress by any means intended to intrude into the area of traditional state regulation of either day care, housing, or apprenticeship training. Indeed, a review of the legislative history reveals that Congress' paramount purpose in enacting ERISA was to "provide for uniform source of law in the areas of vesting, funding, insurance, and portability standards, for evaluating fiduciary conduct, and for creating a single reporting and disclosure system in lieu of burdensome multiple reports," not to strip states of their right to enforce laws designed for the general health and safety of their citizenry. See 1974 U.S. Code Congressional and

Administrative News, 4639, 4655, 4838, 4871, cited in *Boise Cascade Corp. v. Peterson, supra,* 735 F.Supp. at 1441.

The context in which the state's interest in the training of apprentices is sought to be enforced herein is also highly significant. Just as Congress enacted the federal Davis-Bacon Act, 40 U.S.C. § 276a, to provide for payment of prevailing wages and the employment of qualified craftsmen on federal public works, the State of California has sought to ensure the necessary training of skilled journeyman craftspeople on state public works through the auspices of California Labor Code § 1777.5. The regulation of apprenticeship training on government-sponsored projects thus constitutes merely another example of a state's exercise of its traditional police power to further and protect the health, welfare, safety, and prosperity of its citizenry, and interferes with no Congressionally-directed scheme.

Finally, to the extent that the Ninth Circuit Court of Appeals' decision in *Hydrostorage, Inc. v. Northern California Boilermakers Local Joint Apprenticeship Committee,* 891 F.2d 719 (9th Cir. 1989), *cert. den.*, ____ U.S. ____, 111 S.Ct. 72 (1990) supports a contrary conclusion, that decision is distinguishable from the instant case and was in any event wrongly decided. As Petitioners point out, the employer there did not voluntarily execute an agreement to train apprentices as did Respondents, and was therefore not subject to the type of state court action to enforce such an agreement which Petitioners presently seek to assert. Quite simply, not even *Hydrostorage* stands for the proposition that contractors who sign DAS-7 training agreements do not have to comply with them by hiring and training apprentices on public works jobs in accordance with training standards mandated by

the state and adopted by apprenticeship training committees for the purpose of ensuring safe and proper training. Moreover, the Ninth Circuit's rote and simplistic analysis of the ERISA preemption doctrine, upon which the state Court of Appeal blindly relied, cannot be countenanced in view of the Ninth Circuit's failure to even consider the status of apprenticeship training standards as exercises of a state's traditional police powers and the detrimental impact on the entire system of apprenticeship training that would result from its holding.

Petitioners' attempt to enforce its apprenticeship standards through a private state court action is therefore not preempted by ERISA, and a writ of certiorari should be directed to the California Court of Appeal to redress the appellate court's erroneous decision.

II

THE COURT OF APPEAL'S DECISION IMPAIRS THE IMPLEMENTATION OF THE FEDERAL FITZGERALD ACT, UNDER WHICH THE FEDERAL GOVERNMENT HAS ABDICATED ITS RESPONSIBILITY FOR THE ENFORCEMENT OF APPRENTICESHIP STANDARDS TO THE STATES.

ERISA preemption of the enforcement of Petitioners' apprenticeship standards is also foreclosed by the "savings clause" of ERISA, 29 U.S.C. § 1144(d), which provides that

> Nothing in this subchapter shall be construed to alter, amend, modify, invalidate, impair or supersede any law of the United States ... or any rule or regulation issued under any such law.

This provision has been employed in a wide variety of circumstances in which the courts have refused to find

state laws preempted when they were useful or necessary for enforcing another federal statute. Preemption of Petitioners' rights to enforce their apprenticeship standards in these circumstances would impair the operation of the United States Fitzgerald Act, 29 U.S.C. § 50, which itself preempts the field of apprenticeship training. *Associated Builders and Contractors, Inc. v. McDonald,* 731 F.Supp. 966, 969 (D. Nev. 1989).

The Fitzgerald Act was enacted in 1937 to promote the furtherance of labor standards necessary to safeguard the welfare of apprentices training in this country. 29 U.S.C. § 50. Only two years later, the California Legislature enacted the Shelly-Maloney Apprentice Labor Standards Act of 1939 for the identical purpose. The Shelly-Maloney Act, through the creation of the above-mentioned Division of Apprenticeship Standards and the California Apprenticeship Council, has served as the vehicle by which the federal purpose of promoting and protecting the welfare of the apprentices and of ensuring their safe and efficient training has been achieved in this state.

Over the years, the Division of Apprenticeship Standards and the Department of Labor, through its Bureau of Apprenticeship Training, have entered into "cooperative working agreements" for the purpose of carrying out the ultimate purpose of the Fitzgerald Act and its implementing regulations. These agreements have specifically provided that the federal B.A.T. and the state D.A.S. share responsibility to work "as complementary units to promote, develop, and maintain both apprenticeship and other on-the-job training systems," and that "all new registered apprenticeship programs shall be consistent with the provisions of state law and regulation." By means of agreements similar to this one, the federal government has thus historically abdicated its responsi-

bility for the enforcement of apprenticeship training standards to the states, which have in turn implemented the legislative and regulatory schemes necessary to protect and advance the welfare of apprentices training in their jurisdictions under laws such as the Shelly-Maloney Act.

The Court of Appeal's decision threatens this long-standing system of apprenticeship training by calling into question a state's right to regulate any standards for apprenticeship training, or an apprenticeship program's right to enforce such standards, merely because such programs purportedly constitute "employee welfare benefit plans" under ERISA. Indeed, the entire purpose and function of the Fitzgerald Act, to further and advance the training of apprentices in state-approved training programs, would be vitiated if, as the Court of Appeal held, any attempts to enforce apprenticeship training standards run afoul of the ERISA preemption doctrine. This is a result which would undoubtedly do serious harm to the present system of apprenticeship training, its usefulness to our nation's development of its potential human resources, and our competitive place in the world's economy.

Interestingly, a judge of the superior court of the State of California has already reviewed the potential impact that ERISA preemption of California's regulatory laws governing apprenticeship training standards would have on the implementation of the Fitzgerald Act:

> These regulations [8 California Code of Regulations Sections 208, 212, 212.2] are the embodiment of the standards to safeguard the welfare of apprentices which the Fitzgerald Act requires the Secretary of Labor to formulate and to extend the application of by cooperation with appropriate State agencies. 29 U.S.C. section 50. Preemption of these provisions

> would not only impair, but would wholly undermine, the Fitzgerald Act and the federal regulations issued under the Act to implement its objectives. See 29 C.F.R. sections 29.1, 29.5, 29.12. As in *Shaw v. Delta Airlines* (1983), 463 U.S. 85, 102, preemption of these provisions "would frustrate the goal of encouraging joint state/federal enforcement" of the federal statutory scheme. Indeed, in *Hydrostorage* itself, the District Court recognized that "federal policy favors 'the formulation of programs of apprenticeship' " and cautioned that its holding should not be taken "as denigrating the desirability of apprenticeship programs, invalidating the State's policy to promote such programs, or *denying state authority to regulate the conditions of employment of apprentices*" (685 F.Supp. at 723) (Emphasis supplied).

Judgment of the Superior Court dated April 18, 1989, Stuart R. Pollak, Judge, in *Associated Builders and Contractors J.A.C. v. State of California,* San Francisco Superior Court Case No. 900162.

Importantly, the courts have traditionally upheld state statutes enacted pursuant to federal law even though such statutes "relate to" ERISA plans. For example, in *Shaw v. Delta Airlines, Inc.,* 463 U.S. 85, 103 S.Ct. 2890, 2902-03, 77 L.Ed.2d 490 (1983), the Supreme Court used § 514(d) of ERISA to find that a New York statute which regulated the benefits available to pregnant employees was not preempted by ERISA because the state statute was useful in enforcing another federal statute, namely Title VII of the Civil Rights Act of 1964. The Court found that given the importance of state fair employment laws to Title VII's enforcement scheme, preemption would frustrate the goals of Title VII and would, in the words of § 514(d), "modify" and "impair" federal law. Here, pre-

emption of a joint apprenticeship committee's right to enforce apprenticeship standards adopted pursuant to state law would also modify and impair the Fitzgerald Act's ultimate goal of enforcing apprenticeship training standards, and would thus also run afoul of § 514(d).

The Supreme Court in *Shaw* did not specifically hold that a state law must be an "enforcement mechanism" of a federal law in all cases in order to be saved from preemption by § 514(d), as the Ninth Circuit in *Hydrostorage* and the Court of Appeal in this proceeding apparently believed. Rather, the Supreme Court in *Shaw* merely analyzed a state law in the context of the purposes for which it was enacted, and found that the state law was useful to the enforcement of the federal scheme. *See Shaw, supra,* 463 U.S. at 102. However, even if a state law is required to be an "enforcement mechanism" of the federal statute, Petitioners' instant state court action clearly meets that test. Indeed, there can be no more effective way of enforcing the Fitzgerald Act's purpose of protecting and advancing the welfare of apprentices than by an action requiring an employer to hire and train apprentices under standards approved by the "recognized state agency" under the federal regulations for training purposes.

The courts have long recognized the need to accommodate the policies and goals of ERISA with those of other federal laws when, as here, the provisions of separate federal statutes appear to conflict. See *Pension Benefit Guarantee Corp. v. LTV Corp.,* 875 F.2d 1008, 1016 (2nd Cir. 1989) (holding that the goals of ERISA must be accommodated with those of bankruptcy and labor law); *In Re Vickers,* 12 Employee Benefit Cases (BNA) 2236, 2241 (W.D. Mo. 1990) (harmonizing specified exemptions of interest in pension plans contained in the Bankruptcy

Code with ERISA); *In Re Matter of Goff,* 706 F.2d 574, 786-7 (5th Cir. 1983) (finding that ERISA's specific provision precluding interference with the operation of federal law rendered the Bankruptcy Code effective over any ERISA provisions to the contrary). In fact, federal courts faced with clear conflicts between ERISA's preemptive provisions and the necessary implementation of other federal laws have not hesitated to find those laws "saved" by § 514(d). See *Beard v. Carrollton R.R.,* 893 F.2d 117, 123 (6th Cir. 1989) (claims arguably covered by ERISA held subject to the primary and exclusive jurisdiction of the National Railroad Adjustment Board); *Connors v. Amax Coal Co., Inc.,* 858 F.2d 1226, 1231 (7th Cir. 1988) (finding that ERISA did not preempt application of administrative procedures for the recovery of black lung-related medical expenses under the Longshore and Harbor Workers' Compensation Act); *Calhoun v. F.D.I.C.,* 653 F.Supp. 1288, 1293 (N.D. Tex. 1987) (holding that the F.D.I.C., pursuant to its regulatory provisions, had the power to withhold payment of pension plan benefits along with other types of insured deposits without running afoul of the preemption provisions of ERISA).

Lastly, it is necessary to recall that ERISA was enacted in 1974, thirty-seven years after passage of the Fitzgerald Act, and thirty-five years after the State of California began regulating apprenticeship training in this state. The Fitzgerald Act is therefore clearly the kind of statute that was firmly in place at the time of ERISA's enactment and which ERISA, by operation of its savings clause, took pains not to displace. *See I.A.M. National Pension Fund, et al. v. Slyman Industries,* 704 F.Supp. 301, 302 (D. D.C. 1989). Indeed, it is beyond belief that Congress even considered displacing the federally-established system for the supervision of apprenticeship train-

ing in view of its expressly stated intent that cooperative arrangements between state and federal agencies continue when necessary to the enforcement of other federal laws. See Legislative History of the Employee Retirement Income Security Act of 1974, Public Law 93-406, Prepared by the Subcommittee on Labor of the Committee on Labor and Public Welfare, U.S. Senate, April 1976, Volume II, p. 2364, Vol. III, p. 4671.

The Fitzgerald Act's essential objective of furthering the training of apprentices under acceptable standards in state-approved training programs would therefor be seriously impaired if the Court of Appeal's decision is permitted to stand.

CONCLUSION

Based on the foregoing, together with the arguments advanced in the Petition for Writ of Certiorari, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeal.

Respectfully submitted,

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APPENDIX A

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Title 8 § 212. Content of Apprenticeship Program Standards

Apprenticeship programs shall be established by written standards approved by the Chief DAS. The standards shall be approved only when they cover all work performed within the apprenticeable occupation, conform to applicable law, and contain:

(a) Evidence of:

(1) work site facilities and equipment sufficient to train the apprentice(s);

(2) skilled workers as trainers at the work site(s);

(3) adequate arrangements for related and supplemental instruction pursuant to Labor Code Section 3074;

(4) ability to offer training and supervision in all work processes of the apprenticeable occupation(s);

(5) provisions for evaluation of on-the-job training and related supplemental instruction;

(b) A statement of the:

(1) occupation(s);

(2) party or parties to whom the standards apply and the geographic area;

(3) definition and duties of the apprentice;

(4) working conditions of the apprentice;

(5) current applicable journeyman wage or wages;

(6) ratio or number of apprentices to be employed and the method of determining such ratio;

(7) mechanism that will be used to provide apprentices with reasonably continuous employment in the event of a layoff or the inability of an employer to provide training in all work processes as outlined in the standards;

(8) requirement for incorporating the provisions of the standards into the apprentice agreement.

(c) Provisions for:

(1) establishment of an apprenticeship committee if applicable;

(2) administration of the standards;

(3) establishment of rules and regulations governing the program;

(4) determining the qualifications of employers if other than single employer programs;

(5) determining the qualifications of apprentice applicants;

(6) an apprentice worksite job progress and related and supplemental instruction record system;

(7) graduated minimum wage schedules to be paid during the term of training, and applied uniformly to all employers subject to the standards, as applicable:

(A) wage progression schedule shall be in accordance with the collective bargaining agreement, if contained therein;

(B) where the program is not subject to collective bargaining, the wage progression schedule shall be determined by the program sponsor in consultation with the Division of Apprenticeship Standards and shall in no case be less than ten percent (10%) per year, when the entry

wage is based on fifty percent (50%) of the current journeyman wage.

(8) discipline of apprentices and including provisions for fair hearings;

(9) termination or recommendation of cancellation of apprentice agreements;

(10) recommending issuance of State Certificates of Completion of Apprenticeship pursuant to Section 224 of this Chapter;

(11) revision of standards;

(12) training and education of the apprentice in first aid, safe working practices and in the recognition of occupational health and safety hazards;

(13) fair and impartial treatment of applicants for apprenticeship, selected through uniform selection procedures, which shall be an addendum to the standards, pursuant to Section 215 of this Chapter;

(14) mobility between employers when essential to provide exposure and training in various work processes in the apprenticeable occupation;

(15) approval of the standards by the Chief DAS.

(d) The names and signatures of the parties.

APPENDIX B

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Labor Code § 3073. Administration of chapter

The Chief of the Division of Apprenticeship Standards, or his or her duly authorized representative, shall administer the provisions of this chapter; act as secretary of the California Apprenticeship Council; shall foster, promote, and develop the welfare of the apprentice and industry, improve the working conditions of apprentices, and advance their opportunities for profitable employment; shall ensure that selection procedures are impartially administered to all applicants for apprenticeship; shall gather and promptly disseminate information through apprenticeship and training information centers; shall maintain on public file in all high schools and field offices of the Employment Development Department the name and location of the local area apprenticeship committees, the filing date, and minimum requirements for application of all registered apprenticeship programs; shall cooperate in the development of apprenticeship programs and may advise with them on problems affecting apprenticeship standards; shall audit all selection and disciplinary proceedings of apprentices or prospective apprentices; may enter joint agreements with the Employment Development Department outreach education and employment programs, and educational institutions on the operation of apprenticeship information centers, including positive efforts to achieve information on equal opportunity and affirmative action programs for women and minorities; and shall supervise and recommend apprenticeship agreements as to these standards and perform such other duties associated therewith as the California Apprenticeship Council may recommend. The chief shall coordinate the exchange, by the California Apprenticeship Council, the apprenticeship program sponsors, the Fair Employ-

ment and Housing Commission, community organizations, and other interested persons, of information on available minorities and women who may serve as apprentices.